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FINAL REPORT

LEGISLATIVE EDITION

CHARLES E. BRANDES
LAND USE ANALYST
AND
STUDY COORDINATOR

STATE OF MONTANA
ENVIRONMENTAL QUALITY COUNCIL
STATE CAPITOL
HELENA, MONTANA
NOVEMBER 13, 1974

SENATOR ELMER FLYNN
CHAIRMAN

JOHN W. REUSS
EXECUTIVE DIRECTOR

RESEARCH SUPPORTED BY FORD FOUNDATION GRANT NUMBER 730 - 0141

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HOUSE JOINT RESOLUTION 9
(March 3, 1973)

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA DIRECTING THE ENVIRONMENTAL QUALITY COUNCIL TO UNDERTAKE A MONTANA LAND USE POLICY AND LEGISLATION STUDY AND REQUESTING THE GOVERNOR TO APPOINT AN INTERDEPARTMENTAL ADVISORY COMMITTEE.

WHEREAS, Montana has historically concerned itself with the development of its natural resources and the quality of its environment, and

WHEREAS, this concern, in the past, has been reflected by the development of policy and law with regard to the anticipated growth of Montana and the development of its resources, and

WHEREAS, Montana's growth and development has increased the complexity of person-to-person and person-to-environment interrelationships, and

WHEREAS, both the people and the environment of Montana must suffer the waste of these conflicts, and

WHEREAS, section 69-6514 (f), R.C.M. 1947, makes it the duty of the executive director and staff of the environmental quality council to make and furnish such studies, reports thereon and recommendations with respect to matters of policy and legislation as the legislative assembly requests.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the environmental quality council is hereby directed to undertake a thorough study of land use practices and policies in Montana and elsewhere in the United States, prepare a report and make recommendations with respect to such practices and policies, and prepare suggested legislation for the consideration of the governor and the 1975 legislature, and

BE IT FURTHER RESOLVED, that the governor is requested to appoint an interdisciplinary, interagency advisory committee to work with and advise the environmental quality council, and jointly propose recommendations to the governor and the legislature. The avowed purpose of this resolution is to obtain a comprehensive plan, together with suggested legislation, to insure an orderly development and expansion of Montana's natural resources without exploitation.

BE IT FURTHER RESOLVED, that the secretary of state send a copy of this resolution to the governor of the state of Montana.

Foreword and Scope

This study has been prepared in response to House Joint Resolution 9 (HJR 9) enacted by the 1973 Montana legislature. The resolution directed the Environmental Quality Council to undertake a thorough study of state land use practices and policies here and elsewhere and to prepare a report and make recommendations with respect to such practices and policies for the consideration of the governor and the 1975 legislature. The EQC believes that this study satisfies the legislative resolution reasonably, objectively, and directly.

The staff of the council has focused its investigation on five aspects of the land use issue in Montana:

1. An overview of the past and present use of land, the changes that are occurring in use, the forces behind the changes, and some of the effects of these changes on the lives of Montanans (Part I).

2. The implicit land use policy of Montana today and how the implementation of that policy is distributed among the state's governmental entities (Part I).

3. Possible ways to bring order and structure to government land use decision making (Part II).

4. The basis for a policy of making land use decisions and the development of a recommended program and policy (Part III).

5. Issues that lie beyond the scope of this study but which greatly affect the use of land in Montana.

This study brings these aspects together and strongly endorses a program for consideration by the legislature and the governor. The suggested program concerns

the role of state government in land use decision making, the interactions of state agencies, and coordination of the levels of government.

This report does not lay out a land use plan for the state, but it offers an approach to establishing a land use policy and decision-making process. The council and its staff hope that this study will help persuade legislators, the governor, and the people that the time has come for Montana to act, that the time has come for the state to take leadership in decisions affecting the use of land.

But this report does not have the answer--there is no one answer. Presented here is a process that, used wisely, can guide Montana to a future where the values of the state's great land resource are maintained and enhanced for the minority alive today and the majority that will follow tomorrow.

Acknowledgments

Many people contributed to the EQC Montana Land Use Policy Study. Thanks is due Fletcher E. Newby, former EQC Executive Director, who initiated the study. Deborah B. Schmidt, former EQC research assistant now with the Legislative Council, helped prepare the state agency review. Dave Kinnard, an EQC legal assistant now a law student at the University of Montana, and Ken Porter, an EQC research assistant, helped in many areas. Tina Torgrimson, an EQC consultant, provided background material on Montana's past. Richard Bourke, the EQC staff economist, had major responsibility for analyzing regional and state growth and land use patterns. Ronald J. Schleyer, EQC environmental impact statement coordinator, was responsible for final editing. Lastly, we would like to thank the rural decision makers who responded to the EQC land use questionnaire, the members of the governor's Land Use Advisory Council for their critical comments, and the members of the Environmental Quality Council

who commented on the draft report. All of these people saved us from numerous errors. Of the errors remaining, the EQC staff bears full responsibility.

Summary of Recommendations*

The EQC Montana Land Use Policy Study acknowledges the strong pressures at work in Montana. Growth, however defined, is going to continue, though it is a matter of speculation as to the precise rate and kind of growth. The expanding need for feed and food, the growing demand for energy and minerals, and the spreading appeal of Montana's bountiful physical amenities will surely bring about changes in the Montana way of life. But Montana must not deny or lose the opportunity to guide her future. The need for a state land use policy is manifest.

Today, decisions are made in a fragmented, uncoordinated manner by 182 local governments, 19 state departments and assorted independent agencies, at least 18 federal bureaucracies, seven Indian reservations and by about 700,000 residents and an undetermined number of non-residents. The system guiding these decisions is the same system that gave Los Angeles to California, Denver to Colorado, and Miami Beach to Florida. If history is any guide, it is unlikely that this system will treat Montana much better.

The Montana Land Use Policy Study makes four interlinked recommendations based on three fundamental assumptions:

ASSUMPTION 1

Governing should be done by that level of government which is the closest to the people yet capable of performing the desired function. In Montana, for most land use issues, local government can meet this requirement.

*A full development of these recommendations can be found on pp.161-182 of this study.

ASSUMPTION 2

There are land use issues in which the people of the state in general have sufficient interest to override occasionally the narrow interests of a locality.

ASSUMPTION 3

Actions of government agencies should be subject to the same scrutiny and regulation as the actions of private individuals and organizations.

Freedom of Action

Adhering to these assumptions, a system of land use decision making is proposed which would allow Montanans to take control of their future without unnecessarily disrupting the traditions of the state or interfering with the legitimate expectations of its citizens.

Based on the three assumptions, the state would be free to work in eight land use decision making areas:

1. Decisions affecting or affected by past or projected major public facilities or other projects representing a major public investment.

2. Decisions concerning areas containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance.

3. Decisions concerning areas that embody a significant natural hazard.

4. Decisions concerning areas proposed as sites for new towns.

5. Decisions which have signficant impacts beyond the jurisdictional boundaries of a local government.

6. Coordination of all levels of government including state agency actions.

7. Creation of an arena for resolving conflicts arising in the first six areas.

8. The forumulation and articulation of growth and development policies.

The State Role

Consolidating the allowable areas of state intervention into administrative functions yeilds four activities in which the state should have at least a supervisory and sometimes a dominant role:

1. The designation and regulation of areas of state concern.

2. The designation and regulation of developments of greater than local impact.

3. The provision of an appeals procedure and a Montana Land Use Commission to resolve conflicts and insure that statewide interests are considered by local decision makers and that local interests are considered by state decision makers.

4. The creation of a continuous statewide goals forumulation process.

The first two activities require the establishment of new administrative functions: decision making processes in which the state's role would be primarily one of supervision and assistance. Only after local government was given and had refused the opportunity to accept the responsibility of governing would state government assume an active role. The third activity would require an essentially passive state role; the state would provide an arena for resolving conflicts in the land use decision making process. The fourth activity, also a process, would include all levels of government and a wide spectrum of private interest groups in a comprehensive effort to construct goals. State government is the logical leader of such a program.

RECOMMENDED LEGISLATIVE ACTION:

The Environmental Quality Council recommends that legislation be enacted to implement these functions.

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I. MONTANA TODAY

HISTORICAL PERSPECTIVE

It is no accident that Montana is called the Treasure State, for her history is a tale deeply rooted in the wealth of the land. But even if other resources were to be depleted, Montana's most priceless treasures--space and beauty--could remain in a state of quality forever if Montanans pause now to consider the past and the future.

Even the best hopes rooted in the wealthy land sometimes returned only misery and sorrow for Montanans. Wrested from her original Indian stewards by advancing waves of trappers, cattlemen, miners and homesteaders, Montana gave much under forceful hands. The price of violence was real and lasting: mined-over Bannack is lifeless now; the Anaconda hillsides are barren of trees that fed smelters; the culture of the Indian people lies in the shadow of the white race; deserted towns and vacant shacks dot the landscape, testament to withered hopes and a retreat from sorrow. These are ugly scars, but worthwhile lessons for Montanans today.

For Montana again is on the brink of massive change--enormous plans are afoot for development and industrialization. Now the miners see coal, not gold and silver. Instead of picks and shovels, they carry grease guns for strip mine draglines and the endless coal conveyor belts. Characteristics that heretofore discouraged urbanization--remoteness, topography, climate and sparse population--ironically have become the lures of a new cadre of land dealers who see no conflict between wilderness and suburbia. Their sales pitches are new but the stakes--profit and turnover--were familiar even to homesteading Montanans in the early 1900s.

The early history of boom-bust Montana is perhaps a classic example of a dubious supposition that has had tragic national dimensions: that the relationship

between a person and the land is purely private; that the land's only function is to enable its owner to make money.

Following the 1804-'06 Lewis and Clark exploration, the fur traders set about the first serious exploitation of natural resources in a way that characterizes much of Montana's history. Although the early beaver trappers responded to the whims of eastern fashion, it wasn't whimsy but a solid market that brought the open-range cattle industry to Montana in 1866. This lucrative enterprise satisfied eastern and foreign investors and depended on the seemingly endless sea of grass in eastern and central Montana. But overgrazing and the bad luck of drought weakened the herds. Finally, more than 400,000 cattle starved and froze in the winter of 1886-'87.

The placer miners, whose demand for meat had encouraged the luckless cattlemen, head their beginnings at Gold Creek in 1858. Major gold strikes through 1865 brought thousands of miners, the first of Montana's urban crime, and a permanent metals industry that swelled Montana's population to a quarter million by the turn of the century. Statehood, deep mining and copper smelters replaced the territorial placer diggings and brought bitter rivalries for power that manipulated the legislature and precipitated mining shutdowns and bloody labor fights.

Homesteading, encouraged by the railroads, land speculators, and the government, led 80,000 new citizens to Montana by 1918. They furrowed the prairies with horse-drawn plows and planted nearly as much wheat--3.5 million acres--as is planted today with tractors. The drought of 1919 caused a crop disaster that eventually wiped out towns, banks and 11,000 family farms. Winds attacked the exposed topsoil and more drought finished off most of those who continued trying. More than 60,000 homesteaders eventually left the state. Montana farmers needed 50 years to make dry-land grain farming the success it is today. But the spread of saline seep indicates gaps in the knowledge needed to keep that particularly vital land use from becoming land abuse.

Conditions surrounding land use decisions have changed drastically since the last boom. Perhaps it is the quickening pace of change in general that points emphatically to the need for land use policy. Or perhaps it is the ever growing impact of the energies and machines that respond to our touch. A bulldozer can change in a day what once took a season's labor. The misjudgments of a few can materialize into nightmares for thousands with scant warning. Day by day, complexity feeds on complexity as today's tentative enterprise becomes tomorrow's entrenched practice.

Our descendants will surely judge us on what we do to heed the lessons of the past and provide for their future. Their lives, like ours, will grow from the land. This is the challenge and opportunity facing all Montanans today.

TODAY'S CONCERNS--TOMORROW'S REALITIES

Humans have a tendency to be unaware of undesirable trends until they result in full-blown crises. This is unfortunate, but understandable. Most people are too busy trying to make ends meet and responding to the events of the day to take the long view and try to separate causes from symptoms. Consequently, most individuals and most of society's institutions, public and private, react to problems only as they generate crises.

Typically, for what appear to be compelling reasons, something becomes labeled a "problem." Over time this is brought to the attention of decision makers who, if sufficient interest is evident, pass or amend a law. And so the process goes, a small change here and a minor adjustment there. Rarely are underlying assumptions openly and seriously examined and rarely is the full range of consequences from a particular action or decision assessed. This approach to problem-solving may cure symptoms but frequently results in new problems. The basic fallacy of the piecemeal approach, of course, is that problems must be seen in their context as part of

larger systems if real solutions are to be found. Our inability to deal successfully with natural resource problems is a reflection of our failure to see problems as components of interrelated systems.

The foregoing observations should not be misinterpreted. The point is not that Montanans or the Montana legislature has been remiss in the attention devoted to environmental and natural resource issues. On the contrary, on many vital issues--utility siting, natural areas designation, strip mine reclamation--Montana legislation is looked to as a model by other states. But improving the capacity of Montana's citizens, local governments, and agencies of state government to respond to land use issues rationally and systematically is the object of the EQC Montana Land Use Policy Study.

Highlighting the land use related issues dealt with by the last three Montana legislatures shows clearly their responsiveness to a number of important problems. During these last three sessions, the legislature strengthened existing legislation and took new initiatives in a number of resource and land use areas such as water and waterway protection, wildlife management, mining and mine reclamation, pesticides and pest control, and prevention of environmentally abusive practices.

The 1971 legislature strenghtened the coverage of the Stream Preservation Act of 1967, overhauled the water pollution act of 1967, and passed the floodway management act. In the mining field, the legislature enacted the Landowner Notification Act and passed legislation regulating the reclamation of hard rock mining activities. Some additions were made to the provisions of the statute dealing with city or city-county planning boards and zoning districts. Lastly, the legislature passed the Montana Environmental Policy Act (1).

The 1973 legislature will be remembered for its treatment of land use and energy-related issues. For example, the legislature passed the Utility Siting Act

and the Water Use Act. In addition, the statute dealing with city-county planning boards was revised in the Montana Subdivision and Platting Act.

The passage of the Montana Strip Mining and Reclamation Act established what many regard as the model coal reclamation law. Along with other energy resource taxation and conservation measures, the legislature enacted the Strip Mined Coal Conservation Act. Lastly, concern over the impact of rural subdivisions on agricultural land lead to enactment of a greenbelt law (2).

The 1974 legislature devoted much attention to environmental and natural resource issues. The legislature passed the Strip Mine Siting Act, The Montana Natural Areas Act, and placed a three-year moratorium on significant new appropriations of water from the Yellowstone River (3).

Even this cursory review of legislative action in the environment, land use, and natural resources areas illustrates some important emerging themes. First, time devoted to such issues indicates that the public is very concerned that development in Montana must be carried out with the least possible damage to the environment. Second, the legislature has taken steps to protect land and water as they relate to coal development. Revisions of the eminent domain laws, strip mine and energy conversion facility siting measures, and provisions specifying reclamation procedures are designed to give the state strong regulating powers over coal development. Third, the legislature, through its concern with rural subdivision, the growing interest in industrial uses of the Yellowstone River, and the decline in the use of agricultural land near urban areas, is becoming increasingly concerned with the relationships among economic development, population growth and the quality of life in Montana.

Further, the legislature has declared that certain proposed developments have such enormous impacts that only state government can decide objectively

whether they should be allowed. Hence the state has the last word in siting of strip mines and power generation facilities. The state must approve reclamation plans. The state reviews certain aspects of new subdivisions. The state also grants permits to water appropriators. Most of these activities require environmental impact statements which assist administrators and provide significant opportunity for citizen involvement in decisions, while providing a reference for what is happening to the state as changes occur.

Many of these concerns were reinforced when the staff of the Environmental Quality Council polled Montana county commissioners, conservation district supervisors, and city-county, county, and area-wide planning board members in April 1974 (4). These groups are extremely interested in land use issues. From a list of traditional land use problems, these groups indicated concern over the following issues:

1. Preservation of the economic base represented by prime agricultural and forest lands.

2. Cooperation among, state, regional, and local levels of government in decisions regarding the use of land and water.

3. Control of erosion, sedimentation, and the fillings and dredging of lakes and streams.

4. Encouraging desirable development.

5. Inability to influence land use decisions made outside the county which have effects within the county.

6. Guiding development to locations which minimize the undesirable effects of development.

7. Regulating subdivision location and design.

8. Protecting scenic, cultural, scientific, archaeological, and historical values.

9. Public access to state and federal lands and waters.

10. Cost of planning, both for the individual and the local government.

These same local officials were asked to list what they considered the most serious land use issues in their areas. Their response follows:

1. Preservation of the economic base represented by prime agricultural and forest lands.

2. Control of erosion, sedimentation, and the filling and dredging of lakes and streams.

3. Cooperation among state, regional, and local levels of government in decisions regarding the use of land and water.

4. Regulation of subdivision location and design.

5. Encouraging desirable development.

6. Water use, development and storage.

In addition, local decision makers, particularly county commissioners, questioned their ability to react effectively to the changes occurring within their jurisdictions. Reluctant to raise taxes, lacking adequate technical advice, often overwhelmed by private developers, and unfamiliar with all the impacts (benefits and detriments) associated with development proposals, Montana's county leaders need help before their concern over land use issues turns to cynicism.

More evidence of the growing interest in land use issues is provided by a series of meetings on land use sponsored by the Montana Committee for the Humanities. Nine regional workshops were conducted during October 1974 to bring citizens together to discuss and communicate their concerns over land use issues in their area.* A statewide conference in Great Falls was to integrate the issues identified locally and focus on those common elements which must be included in a statewide policy on land use.

*Workshops were in Lewistown, Kalispell, Missoula, Butte, Bozeman, Billings, Miles City, Havre and Wolf Point.

These workshops illustrate that the issues surrounding land use in Montana are of tremendous concern to Montana citizens; a total of nearly 1400 persons attended the nine workshops. For example, more than 250 persons attended the Miles City workshop on October 29, 1974. During the course of the meeting nine questions emerged from the exchange of views identifying issues:

1. Do we want to preserve agricultural land and if so, how?

2. Can we maintain individual property rights in a planning process?

3. What are our concerns about government management of agricultural lands?

4. Land use planning should be done locally--but what kinds of planning and how?

5. How do we avoid national land use planning?

6. What kinds of state and local controls will support planning and how can we influence state government?

7. Where should planning and control take place?

8. How can we keep our own individual rights and avoid government planning at any level?

9. How can we benefit from the mistakes made in other communities?

Is all this concern justified? Will not everything work out all right if we just go about our business?

Answers--the only ones now available--come from looking at other states. Governor Thomas L. Judge has commented that Montana is lucky that she is some years behind other states in development and has the opportunity to learn from their mistakes. Looking at other states we can gain a glimpse of a possible future.

What has happened to the orange groves and beautiful beaches of southern California and the magnificant view of the Rockies from Denver is a cliche that needs little repetition.

Likewise, the subdivision of Florida is infamous. Over 200,000 lots in recreation and retirement subdivisions are registered each year. In one disastrous example, a single company drained and subdivided 113,000 acres of swamp. Purchased for from $100 to $150 dollars an acre the lots were resold for as much as $1800 an acre. Ten years after the start of the subdivison there were three homes there. One landowner had discovered it would cost $2,880 to install a phone line reaching his site. The drained swamp also proved to be an extremely dangerous fire hazard(5).

In New Mexico, a basically rural state somewhat like Montana, estimates are that more than a million acres have been subdivided. If built upon, these lots could accommodate eight million persons, or eight times the present state population. State law requires developers to provide access and so bulldozers scraped many a grid out of the desert (5).

In one rural Pennsylvania county, subdividers mapped 25,000 lots and sold 12,000 in five years. The population of the county was less than 15,000 before the subdividers began their work. Soils in half the area subdivided are unsuitable for on-site sewage disposal systems, yet 89 percent of the subdividers provided no sewers (6).

In another Pennsylvania county, 46,000 acres were subdivided in five years beginning in 1967. By 1973 the rate of subdivision reached 10,000 acres per year, and at that rate 30 percent of the county would be subdivided by 1980. In Pike and Monroe Counties, Pennsylvania, occupation of all the lots sold since 1968 would result in a "second home population" five times the local resident population (6).

If the implications of providing public servies to such enormous developments are staggering, so are the implications of all that land remaining idle. With the passage of time, ownership will become clouded and consolidation of small lots impossible. If a handful of scattered houses spring up the subdivision may become a rural slum, served by poor roads and few services. Being too small for

agriculture or other non-urban uses the parcels are neglected--open space and farmland transformed into vacant lots.

The Environmental Quality Council believes that Montanans must address land use issues and take bold, new initiatives. The Montana legislature has demonstrated its concern for the protection of the Montana environment. The legislature has provided strong guidance in select areas but more action is needed. The interest in rural subdivisions, the impact of accelerated energy development on Montana agricultural land, concern over planning, and what appears to be a consensus that a high quality of life in Montana is closely tied to maintaining the agricultural base of the state provides the backdrop against which a land use policy must be formulated.

Montana has two features that make it unique among the states. First, its agricultural way of life has resulted in a small, dispersed population. Second, Montana now has a healthy and stable environment. These two characteristics go hand in hand; one cannot exist without the other. Preserving the agricultural economic base and its accompanying way of life will limit both the type and number of other kinds of land use. Also vital is the concept of protecting land that either provides environmental health (for example, wildlife habitat and unique historical or natural areas) or endangers human activity (for example, floodplains and earthquake zones).

The time is ripe. Montana is at a crossroads. No Montana land use problem, be it rural subdivision, saline seep, or coal development, has yet reached the point where it is irreversible.

Because different patterns of land use over the years will have significantly different impacts on the local and regional community, the public is becoming more and more aware of the disadvantages of letting individuals implicitly or explicitly do the planning for current and future generations. When we look at other western states--Arizona, California, and Colorado--we can see what has taken

place in the absence of effective public involvement in land use decision making. Today, pressures on Montana land lead us to the conclusion that now, more than ever, there is a valid public interest in private decisions regarding land use. Agreeing that we want, for example, to avoid repeating some of Colorado's mistakes but believing that it won't happen here or that we have plenty of time to devise some way of avoiding them, is not a very wise approach. Likewise, "business-as-usual" will not suffice. To do nothing would perpetuate practices proven to produce untoward consequences. Similarly, failure to acknowledge the legitimacy of public interest in land use decisions will produce ineffective programs.

The right to property by individuals is a basic one, guaranteed by the U.S. Constitution and particularly cherished by many Montanans. Like other rights, this one is not absolute; like other rights, its exercise entails considerable responsibilities. The individual right of property does not mean that the owner may do anything at all with the land.

The future of Montana depends on taking positive, public action now. Maintaining an environment capable of sustaining itself and providing a high quality of life for its citizens--provided today by the agricultural economy--is the responsibility of the state.

NATIONAL GROWTH AND THE ROCKY MOUNTAIN WEST

Depending on the national fertility rate, the nation's population is expected to jump from 209 million in 1973 to between 265 and 300 million by the year 2000.

The Western Region* of the U.S. Bureau of the Census is the only census bureau region whose share of the total U.S. population is projected to grow over the next 20 years if the interstate migration trends established before 1970 continue. Its share is expected to grow from 17.2 percent in 1970 to 19.1 percent in 1990.

*Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington Oregon and California.

The population of the mountain sub-region,* including Montana, is expected to increase from 8.28 million in 1970 to 10.89 million in 1990, or from 4.1 percent to 4.3 percent of the U.S. population (8).

Economists generally predict increasing discretionary income and leisure time over the next 20 to 30 years. Forecasting economic trends is always hazardous, however, for the future depends on many variables which seem to be in constant flux: international political and economic trends; the increasing and sometimes artificial scarcity of minerals and fossil fuels; availability of investment capital; governmental policy, and the supply of food and agricultural commodities. Recent high inflation rates and successive quarterly drops in the Gross National Product (GNP) have substantially tempered the short-term prospects of general economic growth, but few really expect the long-term future to hold apocalyptic economic problems.

What will be the impact of national trends on Montana's future? Three key trends will determine, in large part, Montana's future economy, First, demand for agricultural products will continue to outstrip world supply and will create an increasing need for Montana's agricultural production. Second, growing national demand for energy and minerals will continue to put pressure on Montana's resources. Third, Montana's unsurpassed physical appeal will remain in demand for recreational, second home and retirement purposes.

None of these trends appears transitory. Each promises to continue into the foreseeable future, placing ever larger demands on Montana's land and resource base, either for increased development or more intensive use. Requirements to satisfy the demands can conflict with one another, spawning difficult questions that have profound ramifications: Water for energy production or food production? Land for farms or subdivisions? Recreational resources for hunting, backpacking, camping and

*All of the Western Region except Washington, Oregon and California.

photography, or for all-season resorts, power lines, condominiums and aerial trams? Someday these conflicts will be resolved, but on whose terms? Who will decide? If the people of Montana do not debate and decide them through their elected representatives then the special interests will do it for them.

Some of these conflicts are upon us today. Aggregate water demand for industrial and agricultural purposes in the Yellowstone Basin exceeds prudent estimates of supply. Meeting the demand probably would require construction of large reservoirs, the flooding of many valleys and permanent changes in large regions and the permanent loss of miles of free flowing rivers. So far, this threat to the land has been stayed by a moratorium on large water diversions in the basin, but crucial decisions remain ahead.

Many impacts of Montana's growth are more subtle and widespread, such as the quiet blur of subdivision across thousands of acres of range and farmland. As population grows so will the demands and the potential for conflict. Irreversible commitments of Montana's land are being made today, and more commitments will come tomorrow. Accelerating Montana's population growth would spur the pace of change and compound the chances for damage.

Population Projections for Montana

Between 1960 and 1970 Montana's population increased 2.9 percent, from 674,767 to 694,409. In mid-1974, Montana's estimated population was 735,000, or 5.8 percent larger than in mid-1970, according to the latest federal census estimates (8). Earlier estimates of county population changes from 1970 to 1973, done by the University of Montana Bureau of Business and Economic Research in cooperation with the U.S. Bureau of Census, indicate growth of a similar magnitude. Nine counties had a 10 percent or greater increase. Only one county, Powder River, had a decrease greater than 10 percent (See Table 1).

TABLE 1 (9)

Estimates of the Population of Montana Counties (in 1970, 1972 and 1973)

County	July 1, 1973[a]	July 1, 1972	April 1, 1970[b]	Change, 1970 to 1973		Components of Change, 1970 to 1973[c]			
								Net Migration	
				Number	Percent	Births	Deaths	Number	Percent
Montana, total	721,000	716,000	694,409	26,000	3.8	39,000	22,000	9,600	1.4
Beaverhead	8,000	8,200	8,187	-200	-2.8	400	300	-200	-5.0
Big Horn	11,100	10,300	10,057	1,000	10.3	700	300	600	6.1
Blaine	6,800	6,700	6,727	(Z)	0.6	400	300	-100	-1.4
Broadwater	2,700	2,600	2,526	200	8.8	100	100	100	3.5
Carbon	7,800	7,500	7,080	700	9.7	300	400	800	11.1
Carter	1,800	1,900	1,956	-100	-6.9	100	100	-100	-6.9
Cascade	83,700	84,200	81,804	1,900	2.3	5,100	2,200	-1,100	-1.3
Chouteau	5,900	6,300	6,473	-500	-6.0	300	200	-600	-8.4
Custer	11,300	11,800	12,174	-800	-6.7	600	400	-1,000	-8.5
Daniels	3,100	3,100	3,083	(Z)	0.6	100	200	(Z)	1.2
Dawson	10,900	11,000	11,269	-300	-2.9	700	300	-700	-6.3
Deer Lodge	15,800	15,900	15,652	100	0.8	800	600	-100	-0.6
Fallon	3,800	3,900	4,050	-200	-5.7	200	100	-300	-8.6
Fergus	12,700	12,600	12,611	100	0.8	600	500	(Z)	0.2
Flathead	40,600	41,000	39,460	1,100	2.8	2,000	1,300	400	1.1
Gallatin	35,800	35,000	32,505	3,300	10.0	1,700	800	2,300	6.9
Garfield	1,800	1,700	1,796	(Z)	0.7	100	100	(Z)	1.8
Glacier	11,400	10,900	10,783	600	5.4	700	400	200	1.8
Golden Valley	1,000	900	931	(Z)	3.4	(Z)	(Z)	(Z)	1.6
Granite	2,600	2,600	2,737	-100	-4.4	200	100	-200	-6.6
Hill	17,600	17,900	17,358	300	1.6	1,000	500	-300	-1.6
Jefferson	6,700	6,200	5,238	1,500	28.3	300	200	1,400	26.3
Judith Basin	2,600	2,600	2,667	(Z)	-1.0	100	100	-100	-3.8
Lake	15,600	15,400	14,445	1,200	8.2	800	600	900	6.0
Lewis and Clark	35,500	34,800	33,281	2,200	6.6	1,900	1,100	1,400	4.2
Liberty	2,500	2,400	2,359	100	4.0	100	100	100	3.8
Lincoln	17,900	17,900	18,063	-400	-2.2	1,100	400	-1,100	-6.3
McCone	2,800	2,700	2,875	-100	-3.9	200	100	-100	-3.9
Madison	5,600	5,600	5,014	600	11.2	200	200	600	12.0
Meagher	2,200	2,200	2,122	100	3.8	100	100	100	3.3
Mineral	3,300	3,200	2,958	400	13.7	200	100	300	9.0
Missoula	61,200	60,700	58,263	3,000	5.1	3,300	1,500	1,200	2.1
Musselshell	4,100	3,900	3,734	400	10.0	200	200	400	10.4
Park[d]	11,800	11,800	11,261	600	5.2	500	500	600	5.1
Petroleum	600	700	675	(Z)	-4.3	(Z)	(Z)	(Z)	-4.9
Phillips	5,200	5,200	5,386	-200	-3.8	300	200	-300	-5.4
Pondera	7,200	7,300	6,611	600	9.6	400	200	500	7.5
Powder River	2,100	2,500	2,862	-800	-27.0	100	100	-800	-29.2
Powell	6,800	6,900	6,660	200	2.4	300	200	(Z)	0.6
Prairie	2,000	1,800	1,752	200	12.8	100	100	200	10.7
Ravalli	16,900	16,100	14,409	2,500	17.2	700	600	2,400	16.3
Richland	9,700	9,700	9,837	-100	-1.2	600	300	-400	-3.9
Roosevelt	10,000	10,600	10,365	-300	-3.3	800	400	-700	-6.4
Rosebud	6,600	6,400	6,032	600	9.2	500	200	300	4.3
Sanders	7,400	7,500	7,093	300	4.8	400	300	200	2.4
Sheridan	5,500	5,800	5,779	-200	-4.1	200	200	-200	-4.0
Silver Bow	42,200	42,100	41,981	200	0.6	2,500	1,900	-300	-0.7
Stillwater	4,800	5,000	4,632	200	4.4	200	200	200	3.8
Sweet Grass	3,000	3,100	2,980	(Z)	0.6	200	100	(Z)	-0.6
Teton	6,600	6,500	6,116	500	7.8	300	200	400	6.5
Toole	5,500	5,700	5,839	-300	-5.5	300	200	-400	-6.9
Treasure	1,100	1,200	1,069	(Z)	1.0	100	(Z)	(Z)	-2.8
Valley	13,300	11,900	11,471	1,800	16.1	700	300	1,500	13.0
Wheatland	2,500	2,300	2,529	-100	-2.6	100	100	-100	-3.7
Wibaux	1,400	1,300	1,465	-100	-7.3	100	100	-100	-8.6
Yellowstone	92,300	91,000	87,367	4,900	5.6	5,000	2,200	2,100	2.4

Notes The state estimates are shown to the nearest thousand and county estimates are rounded to the nearest hundred. Net migration is the difference between net population change and natural increase (excess of births over deaths); a negative figure denotes net outmigration.

Z denotes less than 50 or less than 0.05 percent.

[a] Provisional.

[b] Census.

[c] Births and deaths are based on reported vital statistics from April 1, 1970, to December 31, 1972, with extrapolations to June 30, 1973.

[d] Yellowstone National Park is included in Park County.

The minimal population growth of the decade of the 1960s appears to be a thing of the past, notwithstanding recent accounts of a 7.8 percent drop in Montana's population by 1990 projected by the census bureau. This projection was the result of an analysis incorporating effects on Montana of the lowest projected national fertility rates (10).

Projecting Montana's 5.8 percent growth since 1970 yields a population of about 800,000 in 1980, a 15.1 percent increase during this decade. This is over five times the growth during the 1960s, and equal to Montana's population increase from 1950 to 1970.

In addition, the potential impacts of energy development on population in eastern Montana are staggering. Although difficult to forecast with any precision, it has been estimated that anywhere from 10,000 to 50,000 new primary and derivative jobs could be generated (11).

The primary determinant of population growth trends in Montana is in- and out-migration. The 1960s experienced out-migration. Preliminary estimates for 1970-1973 indicate that Montana is now experiencing a net annual in-migration of 1.4 percent.

The 15.1 percent increase projected for 1970 to 1980 therefore may not be excessive. The Department of Intergovernmental Relations has projected 1975 and 1980 population estimates based on a 50 percent increase in net 1970 to 1980 migration. These IGR estimates give a 1975 estimate of roughly 741,000 persons and a 1980 figure of 807,000. The Department of Natural Resources (DNR) also has generated some low, medium, and high population forecasts through the year 2020, based on an analysis of many recent population and employment estimates. Their medium forecast for 1980 is 747,000 which, if current trends prevail, will be surpassed by 1975-'76. DNR's high forecast for 1980 is 908,000, which assumes there will be intensive energy development in southeastern Montana. Most likely our

population in 1980 will fall somewhere between these last two estimates: near 800,000 persons.

If the present trend continues through the end of the century Montana will pass the million mark by the year 2000--a 43 percent increase over our 1970 population. Population forecasting is fraught with assumptions vulnerable to changing circumstances. But prudence demands that in the face of potential population increases of this magnitude, Montanans begin now to protect the resource bases which lend security to the state's economy and offer high quality life styles to her citizens.

LAND USE TRENDS IN MONTANA

It has been said in many different ways that there is a special and pervasive closeness between the people and the land in Montana. Montana's huge spaces seem to sustain this closeness. But Montana's land is in finite supply, comprising 93,217,040 acres or 145,651 square miles (12). The quantity of "space" is not so easily measured, but its quantity and quality are determined by the use Montanans make of their finite land.

Table 2 presents the results of a 1967 land use inventory of 70 percent of Montana. Most of the area inventoried is non-federal land. The federal government controls about 26,570,000 acres of the state.

Land ownership in Montana is divided among the private sector, federal and state governments and Indian reservations. Federal land management agencies administer 29.6 percent of the state's total area while state agencies and institutions administer 6.5 percent. Indian reservations encompass 6.9 percent, and the remaining 57 percent is held privately (13).

TABLE 2 (13)

Land Use	Acres (thousands)
Irrigated cropland	1,648
Non-irrigated cropland	13,341
Pasture	1,263
Range	41,175
Irrigated native grassland	568
Forest and woodland	7,004
Inland water	897
Urban and built-up	818
Other*	520

*Other land uses include farmsteads, private roads, feedlots, ditch banks, rural non-farm residences, mine wastes, borrow pits, and investment tracts.

Many forces are causing changes in the use of Montana's land. Saline seep and coal development are among the easily identified ones. Increasing demand for Montana's agricultural commodities, mineral and forest resources and the growth of Montana's manufacturing and service industries will continue to provide jobs that will enable more people to work and live here. Spreading affluence will allow many more Montanans, and non-Montanans, to realize their dreams for homes in the country: on the lakeshore, in the mountain valley, near the creek. The cumulative effects of these and other more subtle forces on the use of land and on space are not so readily identifiable.

Montana's cities, by Colorado or California standards, are just beginning to show signs of suburban sprawl--the blight so familiar to many new residents arriving to escape metropolitan problems. As will be shown in this study, perhaps 510,000 acres of Montana lying outside cities and towns have been subdivided into 40-acre or smaller parcels and the amount of subdivided land could be growing by 20 percent per year. Yet as many as 60 percent of the existing subdivided lots may not have anything built on them. Unfortunately, the land being subdivided today includes some of the state's best agricultural land--land that will be needed tomorrow to sustain Montana's economic base.

Suburban Sprawl

During the 1960s Montana's overall population increased slightly while the rural farm and rural non-farm population generally decreased. The growth that occurred, occurred in the areas around the cities of western Montana and Billings.

Table 3 supports the contention that most of the growth of the 1960s occurred in urban growth centers, or "urban areas," with a population of 1970 population of 2,000 or more. Urban growth centers include a core city or town and part of one or more surrounding counties (14). During the 1960s, the population of Montana's urban areas grew 16 percent (Column 10, Table 3). However, on the average, the population of core cities and towns grew only 3 percent and the population of the surrounding counties grew only 5 percent. In the 10 fastest growing areas,* core cities and towns grew 19 percent, surrounding counties grew 20 percent while the areas themselves grew 43 percent. Clearly, Montana's urban areas are growing faster than the cities within them or the counties that contain them. In other words, Montana's cities are beginning to sprawl.

Table 4 presents additional evidence of sprawl based on 1973 estimates of net migration into the counties adjacent to five of Montana's most populous counties. Net migration is the difference between natural increase (excess of births over deaths) and total population increase.

*Billings, Missoula, Helena, Bozeman, Libby, Whitefish, Dillon, Sidney, Columbia Falls and Philipsburg.

TABLE 3

Montana Urban Growth Centers

	Service Center Type*	Growth Class 1960-70	1970 Urban Area Population	1970 Incorporated Population b	1970 County Population b	1960 Urban Area Populations b	1960 Incorporated Population b	1960 County Population b	Change 1960-1970 Urban Area Population	Urban Area Percent Change	Incorporated Population	Incorporated Percent Change	County Population	County Percent Change	Urban Area Projections 1985 Population Estimate a	Percent Change a
Billings	M	VF	79.4	61,581	87,367	63.1	52,851	79,016	+16.4	+ 33	8,730	+16.5	8,351	+10.6	145.4	+ 83
Great Falls	M	VF	57.1	60,091	80,357	52.2	55,357	81,962	+ 4.9	- 9	4,734	- 8.6	5,266	-13.4	97.0	+ 70
Missoula	M	VF	52.1	29,497	58,263	37.2	27,090	44,463	+14.1	+ 41	2,407	- 8.9	13,800	+30.5	90.0	+ 73
Butte	M	P	41.4	23,368	41,981	44.4	27,877	46,454	- 3.0	- 7	-4,509	-16.2	4,613	- 9.6	39.6	- 4
Helena	M	VF	31.5	22,730	32,261	21.7	20,434	32,004	+ 9.8	+ 45	2,703	+ 13.4	5,531	+ 9.6	39.6	+ 26
Bozeman	M	VF	22.3	18,670	32,505	16.4	13,361	26,045	+ 5.3	+ 38	5,309	+ 39.7	6,460	+24.8	45.3	+ 14
Kalispell	C	M	19.8	10,536	26,660	17.7	9,151	21,965	+ 2.1	+ 12	385	+ 3.	4,695	+21.4	25.0	+ 26
Anaconda	C	M	15.4	10,556	15,568	12.5	10,453	18,653	+ 2.9	+ 23	103	+ 1.0	1,285	- 6.9	23.3	+ 51
Lincoln	-	-	-	1,220	13,052	14.6	2,014	18,640	- 1.4	- 10	-2,201	-108.3	2,988	- 16.0	1.2	- 92
Miles City	C	M	10.8	9,281	11,697	6.9	2,828	12,317	+ 3.9	+ 71	453	+ 16.0	1,536	+ 44.1	22.4	+ 14
Glendive	C	M	10.9	5,330	10,834	9.9	5,053	12,314	+ 0.1	+ 1	277	+ 5.5	1,033	- 8.0	12.6	+ 16
Livingston	C	D	8.5	6,883	10,197	8.7	6,229	13,114	- 0.2	- 2	-1,346	- 18.0	1,045	- 8.5	10.5	+ 24
Lewistown	C	D	6.9	5,437	12,211	7.9	7,413	15,018	- 1.	- 13	-1,976	- 11.1	1,407	- 10.0	9.8	- 8
Whitefish	-	VF	4.8	1,149	19,460	3.0	2,945	32,945	+ 1.8	+127	384	+13.0	6,495	+ 9.	9.8	+ 33
Hamilton	C	D	4.4	4,780	11,473	5.9	6,398	17,080	- 1.5	- 35	-1,698	- 26.5	5,609	+12.8	6.6	+ 51
Havre	C	VF	4.2	2,895	16,469	3.8	2,475	12,341	+ 2.6	+ 72	24	+ 1.0	2,068	+16.8	8.6	+ 31
Glasgow	C	VF	4.0	4,534	9,197	3.7	4,494	10,504	+ 0.2	+ 6	40	+ 0.9	953	+12.8	5.0	+ 11
Deer Lodge	C	S	3.6	4,583	9,579	4.7	6,241	9,002	- 0.2	- 4	- 21	- 0.5	- 647	- 6.3	4.1	- 9
Columbia Falls	F	VF	3.5	2,852	19,460	2.5	2,122	32,945	+ 1.0	+ 40	730	+34.4	6,495	+19.9	6.2	+ 14
Cut Bank	C	S	4.5	4,004	10,781	4.5	4,519	11,585	+ 0.1	+ 2	- 515	- 11.4	1,493	- 9.0	4.1	- 9
Laurel	F	D	4.6	4,454	87,367	4.7	4,402	79,016	- 0.1	- 2	+ 147	+ 3.2	8,351	+ 5.6	4.1	+ 11
Hardin	F	M	4.1	2,464	14,445	3.7	2,314	13,104	+ 0.4	+ 11	150	+ 6.5	1,341	+10.2	4.2	+ 17
Polson	F	VF	3.9	2,733	10,057	2.9	2,789	10,007	+ 1.	+ 34	- 56	- 2.0	50	- 0.5	5.1	+ 32
Wolf Point	C	S	3.8	3,085	10,365	2.6	2,585	11,731	+ 1.2	+ 46	500	+ 13.7	1,366	- 11.6	4.1	- 14
Shelby	C	D	3.6	3,107	5,813	3.7	3,787	6,737	- 0.1	- 3	- 680	- 18.0	1,044	- 15.5	3.7	- 9
Conrad	C	M	3.0	2,750	6,611	2.7	2,665	7,653	+ 0.3	+ 11	105	+ 3.9	1,042	- 13.6	4.0	+ 51
Baker	C	D	2.9	2,584	6,050	2.5	2,265	3,997	+ 0.4	+ 16	319	+ 14.1	2,053	+ 51.4	4.2	+ 61
Poplar	F	D	2.0	1,389	10,365	2.2	1,565	11,731	- 0.2	- 16	- 176	- 11.2	- 1,366	- 11.6	2.7	- 23
Plentywood	F	M	2.6	2,381	5,779	2.3	2,121	6,958	+ 0.3	+ 12	260	+ 12.3	- 1,179	- 16.9	2.7	- 3
Malta	F	D	2.5	2,195	5,386	2.7	2,239	6,827	- 0.2	- 7	- 44	- 2.0	- 1,441	- 21.1	2.6	- 4
Roundup	F	F	2.5	1,347	14,445	2.1	1,334	13,104	+ 0.4	+ 19	13	+ 1.0	1,341	+10.2	3.0	+ 14
Fort Shaw	F	VF	2.4	1,128	2,771	1.3	1,107	3,014	+ 1.1	+ 85	21	+ 1.9	- 243	- 8.1	3.1	+ 44
Eureka	C	D	2.3	1,195	10,057	2.6	1,229	10,007	- 0.3	- 12	- 34	- 2.8	50	+ 0.5	3.1	+ 21
Brandup	F	D	2.3	2,116	5,734	2.3	2,042	5,509	+ 0.0	+ 0	74	+ 3.6	225	- 4.1	2.3	+ 0
Thompson Falls	F	D	2.2	1,884	10,057	2.2	1,996	10,007	+ 0.0	+ 0	- 112	- 5.6	50	+ 0.5	2.3	+ 4
Troy	H	M	2.1	1,045	14,445	2.1	1,805	13,104	+ 0.0	+ 10	240	+ 13.3	1,341	+ 10.2	2.3	+ 9
Chinook	F	D	2.1	1,811	6,727	2.6	2,526	8,991	- 0.4	- 15	- 715	- 28.3	- 1,264	- 14.1	2.1	- 19
Choteau	F	S	2.2	1,584	8,116	2.2	1,984	7,295	+ 0	+ 0	- 380	- 19.1	821	+ 11.3	2.3	+ 4
Belgrade	F	D	1.9	1,307	32,505	1.9	1,057	26,045	+ 0.0	+ 11	250	+ 23.7	6,460	+ 24.8	2.1	+ 10
Browning	-	D	2.0	1,700	10,781	2.3	2,031	11,585	- 0.3	- 13	- 331	- 15.5	- 782	- 6.8	1.8	- 10
Forsyth	F	D	2.0	1,873	6,611	2.1	2,032	6,147	- 0.1	- 5	- 159	- 7.8	155	+ 2.5	2.1	+ 0
Harlem	F	D	2.0	1,994	6,727	2.8	1,267	9,091	- 0.4	- 22	+ 173	+13.7	- 1,364	- 16.9	1.9	- 5
TOTAL			474.9	354,864	629,303	425.2	343,788	602,844	+49.8	+12%	+ 10,276	+ 3.0	+ 27,351	+ 4.4	672.1	+197.2 +41%

SOURCES:

a Upper Midwest Council. Recent Trends/Future Prospects. A Look At Upper Midwest Population Changes. Minneapolis: The Council, 1973.

b U.S. Bureau of the Census. 1970 Census of Population. Number of Inhabitants. Montana. Washington, D.C.: Government Printing Office, 1971.

NOTE: Great Falls Urban Area population for 1970 includes Malmstrom Air Base. Population 9,374

URBAN SERVICE CENTERS
S-Hamlet
P-Partial Convenience Center
F-Full Convenience Center
C-Community Service Center

M-Regional Service Center
M-Metropolitan Service Center
N-National Service Center
A-Military Base

1960-1970 GROWTH CLASSES
VF-Very Fast 25%
F-Fast 14-24%
M-Moderate 7-13%
S-Slow 1-6%
D-Decline <1%

Growth rate more than twice U.S. growth rate
Growth rate more than U.S. growth rate
Growth rate more than Upper Midwest but less than U.S.
Slow growth rate or decline in population

*Compiled by the Montana Commission on Local Government, 1974

TABLE 4 (9)

Inter-County Effects of Sprawl

County	Net Migration (%)	Adjacent County(ies)	Net Migration (%)
Lewis & Clark	+4.2	Jefferson	+26.3
		Broadwater	+ 5.5
Missoula	+2.1	Ravalli	+16.5
		Mineral	+ 9.5
Yellowstone	+2.4	Musselshell	+10.3
		Big Horn	+ 6.1
Cascade	-1.3	Teton	+ 6.5
Gallatin	+6.9	Madison	+11.0

Subdivision Activity

Until recently the only available information on statewide subdivision activity were the "suburban tract" classification data generated by the Board of Equalization (now the Department of Revenue), for inclusion in its biennial reports. For a number of reasons this information has inherent inaccuracies of a conservative nature but of undetermined magnitude:

1. There is no definitive definition of a suburban tract. The data, gathered by county assessors, are subject to time, effort, and interest constraints, as well as differing interpretations of the term suburban tract.

2. Generally speaking, lots greater than 5 acres are not necessarily included as suburban tract by county appraisers and lots greater than 40 acres are seldom included (15).

3. Not all real estate transactions are recorded by the county clerk and recorder. There is currently no legal requirement to record a deed for those real estate transactions falling outside the scope of subdivision as defined by the Montana Subdivision and Platting Act, enacted in 1973 and amended in 1974. Also, transactions on a contract-for-deed basis, tend not to be recorded at the time of sale. A 1973 state government inventory of subdivision activity in Ravalli

County found 62 percent of current real estate transactions to be by contracts for deed, 73 percent of which were not recorded (16). This inventory data suggests that 45 percent of transactions in rural land never have been recorded.

During the summer of 1974, personnel from the Environmental Information Center* (EIC) researched the records of plats and of certificates of survey in 35 county courthouses. Excluded from the EIC inventory were subdivisions within cities and towns and parcels greater than 40 acres in size (see Appendix A for inventory methodology). Combining the EIC results with the suburban tract data and the results of the Ravalli County inventory provides an estimate of statewide subdivision activity.

Table 5 compares the EIC results to the Department of Revenue's suburban tract figures.

*The Environmental Information Center is a non-profit, public interest group devoted to environmental education. The EIC's main office is in Helena.

TABLE 5

Acres of Subdivision by County

County	Dept. of Revenue March, 1973 (17)	EIC Summer, 1974 (18)
Beaverhead	18,871	1,867
Big Horn	228	662
Broadwater	86	151
Carbon	2,325	2,621
Cascade	4,704	8,460
Custer*	768	17,876
Deer Lodge	2,769	1,832
Fergus	1,142	1,460
Flathead	100,079	56,442
Gallatin	15,573	19,999
Glacier	1,909	635
Golden Valley	1,180	1,204
Granite	5,415	3,888
Jefferson	2,125	2,866
Judith Basin	193	1,460
Lake	19,977	9,880
Lewis and Clark	14,406	10,659
Lincoln	8,163	2,994
Madison	2,187	13,475
Meagher	870	1,402
Mineral	1,004	2,136
Missoula	33,800	40,816
Musselshell	-0-	33,031
Park	5,454	8,052
Pondera	776	558
Powell	12,205	6,928
Ravalli	19,239	50,267
Rosebud	342	454
Sanders	-0-	1,398
Silver Bow	-0-	2,129
Stillwater	6,029	8,713
Sweet Grass	380	703
Teton	651	353
Toole	702	2,081
Yellowstone	17,243	18,647
Total Acres Subdivided	283,811	336,099

Some obvious discrepancies between the figures can be explained easily:

1. The suburban tract classification also includes orchards. This may explain the substantially larger Department of Revenue figures in Flathead, Lake, and Lincoln counties.

2. In Custer County, Sundial Estates and Ranchettes encompasses 17,000 acres. The land had not been platted or filed; however 40-acre tracts were being sold.

3. In Madison County, Shining Mountains has subdivided 10,784 acres, 5,320 were recorded after March, 1973.

4. In Musselshell County, R.L.C., Inc. has subdivided 15,440 acres since March, 1973. Reforestation, Inc. has subdivided 10,306 acres; the dates were not recorded. Timber Tracts, Inc. holds 3,948 acres.

The Department of Revenue figures exceed those of the EIC by 1,000 acres or more in four counties; Glacier, Granite, Lewis and Clark, and Powell. Adding these differences to the EIC total of 334,018 acres reveals that, as of summer, 1974, there are at least 347,924 subdivided acres in the 35 counties.

According to the Department of Revenue these 35 counties contain 98 percent of the subdivided acreage statewide. If the 347,924 acres include 98 percent of all subdivisions, then 355,400 acres have been subdivided statewide. But this figure probably understates the actual total considerably because many real estate sales are on a contract-for-deed basis. As stated earlier, about 45 percent of contracts for deed in Ravalli County were not recorded. Conservatively assuming that 30 percent of subdivided acreage statewide has not been recorded, then about 510,000 acres lying outside cities and towns may have been subdivided into parcels less than 40 acres.

For comparison, 510,000 acres is almost 1 percent of the roughly 60 million acres of private land in Montana. It is 60 percent of the acreage of existing urban (built-up) areas and it equals 1 acre for every 1.5 persons residing in the state in 1974.

From 1963 to 1973 the acreage in suburban tracts increased by an average of 23 percent per year. From March 1972 to March 1973 suburban tract acreage increased 28.3 percent (See Table 6). Projecting the 23 percent average annual increase, Montana's subdivided acreage would increase from the estimated 510,000 acres of today to roughly 4.9 million acres by 1985, exceeding 8 percent of the private land in the state. Previously discussed deficiencies in the suburban tract data may have resulted in overestimating the rate of increase, but even a conservative 10 percent annual increase would result in 1.4 million subdivided acres by 1985.

TABLE 6 (17, 19, 20)

Year	Acreage in Agricultural Land	Acreage in Suburban Tract
1963	53,416,723	36,501
1972	52,037,832	225,886
1973	51,773,311	289,876
	Decrease	Increase
1963-1973	1,643,412	253,375
1972-1973	264,521	63,990

Speculation in Land

The subdivision of agricultural land is all but irreversible. The dispersal of ownership can make it too costly to combine parcels into economically viable agricultural units or into units for other large-scale developments. As cities continue to expand some conversion of land to urban uses is inevitable and in the public interest. But the subdivision of land for which there is little demand or for speculative purposes is a long-term public loss.

Data compiled for Flathead County indicate that, as of May, 1973, only 41 percent of all lots created through subdivision since the county was incorporated (1893) had been built upon and that 27 percent of the lots created had never even been sold (21).

A 1974 U.S. Forest Service study of 11 subdivisions developed in the West Yellowstone area since 1966 reports that only 10 percent of the lots created had been built upon and that 68 percent of them had not been sold (22).

Little additional information on land speculation is available. However, the 80-year period covered by the Flathead County sample lends it substantial significance. If similar amounts of subdivided land throughout the state are unsold and undeveloped, then perhaps 306,000 acres have been subdivided without justification of any housing need.

Conversion of Agricultural Land

U.S. Department of Agriculture data released in January 1974 indicate that there has been a 4.7 million acre decrease in acreage in its "land in farms" category during the last decade in Montana (23). State Department of Revenue figures suggest that 1,643,412 acres of land were removed from agricultural use during the same period. Land is taken from agriculture for a number of uses: conversion to residential or second home use, annexed by cities or towns, conversion to industrial or commercial uses, mining, for reservoirs and highways. Land removed from agriculture for these uses usually is taken forever.

Of the Department of Revenue's estimate of 1.6 million acre decline in agricultural land, 16 percent (264,521 acres) was removed from agriculture during the 1972-'73 farm year alone. At this rate there would be 4.5 million fewer agricultural acres in 1990 than in 1973. Table 6 documents these changes in the use of land.

Table 7 shows acreage changes in the three major classes of agricultural land: irrigated, non-irrigated, and grazing. Interestingly, irrigated land shows the greatest proportional decrease, 7.7 percent. However, one reason for the decrease may be that acres placed in irrigation in 1963 proved economically unsuccessful and

were removed. This explanation is supported by the fact that irrigated acreage in 1966 was substantially less than that in 1963. Non-irrigated and grazing land had roughly the same acreage decreases, although the percentage decline in non-irrigated acreage was three times that for grazing.

During the last year acreage in irrigated and non-irrigated farm uses has increased. Probably the increase is due to new irrigation projects and the cultivation of idle land in response to increased demand and prices for agricultural commodities. Grazing land decreased substantially in 1972-'73 mainly through conversion to non-irrigated cropland.

TABLE 7 (19,24,20,17)

Acres in Agricultural Land Classification

Year	Irrigated	Non-Irrigated	Grazing
1963	1,477,428	12,622,753	38,807,403
1966	1,363,159		
1972	1,362,485	11,514,455	38,330,977
1973	1,363,171	11,870,777	37,976,082

Change in Acreage by Land Class

Year	Irrigated	%	Non-irrigated	%	Grazing	%
1963-1973	-114,257	(-7.7)	-751,976	(-6)	-831,321	(-2.1)
1966-1973	+21	(-0-)				

The data on land conversion also indicate the dual effects of subdivision activity on agriculture. Not only is the acreage available to agriculture reduced, but the land taken out of production tends to be of better than average productivity.

Tabel 8 shows changes in acreage by agricultural land class for the seven Montana counties* having the most land classified in suburban tracts. During the

*Flathead, Gallatin, Lake, Lewis and Clark, Missoula, Ravalli and Yellowstone.

last decade there have been 15.3 percent and 15.2 percent decreases in non-irrigated and grazing acreages, respectively, in these counties. These are significantly greater than the rates of change for the state as a whole, 6 percent and 2.1 percent respectively. The change in irrigated acreage in these counties has been negligible. The number of acres irrigated, however, is heavily dependent on single factors such as a new irrigation project.

TABLE 8 (19, 24, 20, 17)

Change in 7-County Acreage by Class

Year	Irrigated	%	Non-irrigated	%	Grazing	%
1963-1973			-97,098	(-15.3)	-615,157	(-15.2)
1966-1973	-3707	(-.9)				
1972-1973	-4929*	(-1.1)	- 9,222	(- 1.5)	- 80,545	(- 2.0)

*Excluding Lewis and Clark County. Lewis and Clark County had a significant increase in irrigated acreage in 1972-'73 due to recently complete irrigation projects. Including this County would change the figure to +3828.

The assessed value per acre of agricultural land is an indicator of the productivity of the land. The assessed value is derived from estimates of the land's yield and is not affected by inflation. Table 9 compares the average assessed value per acre in the seven counties with that of the state as a whole.

TABLE 9 (19, 17)

Average Assessed Value per Acre (Dollars)

	Irrigated	Non-irrigated	Grazing
1963			
7 Counties	39.13	20.21	3.60
State	33.03	12.43	3.18
1973			
7 Counties	33.55	22.78	3.74
State	32.92	16.42	3.39

It is apparent, that to the extent average assessed value per acre reflects the productivity of land, the seven counties with the greatest subdivision activity generally include land of better than average productivity. The superiority of the land in these counties is most apparent for non-irrigated land.

TABLE 10 (19, 17)

Percent Change in Assessed Value Per Acre

1963-1973	Irrigated	Non-irrigated	Grazing
7 Counties	-14.3	+12.7	+3.9
State	- .3	+32.1	+6.3

Table 10 indicates that the average assessed value per acre, and thus the average productivity of all irrigated land in the seven counties, dropped rather sharply from 1963 to 1973 while the average assessed values of the state's irrigated land in general remained about the same. The decline in average assessed value per acre indicates that the irrigated land going out of production in the seven counties is of better than average production for the counties. Because the seven counties are of generally better than average productivity to begin with, the land going out of production in these counties therefore is some of Montana's best agricultural land.

Information used in this discussion has been abstracted from Biennial Reports of the Montana Board of Equalization. The data are generated by county assessor's officers and are subject to the inaccuracies previously discussed. However, in aggregate these statistics can be assumed reasonably sound.

LAND CONVERSION AND ECONOMICS: THE COSTS OF GROWTH

Decisions committing land, often irreversibly, to a variety of uses are made daily in Montana. In many cases, the decisions are determined by conventional profit and loss accounting, personal income accounting, or traditional cost and benefit

analysis from the perspective of an individual agency. Generally, decisions are being made on a basis of what pays off for the decision maker. This is a popular way of doing things and has received little scrutiny. By definition however, this kind of decision making normally excludes consideration of the public impacts (externalities) it causes. The perspective of the individual usually is limited to a single purpose analysis such as return on investment, economic gain, point A to point B transportation networks, engineering feasibility, and so on.

No doubt these are valid concerns for the single decision making entity. However, decisions which effect land use usually have impacts which extend to the wider community. A decision to develop land either for residential or industrial purposes has many impacts on the local community, including:

1. A rise in taxable valuations in the vicinity of the development, which means higher taxes on nearby residents and increased revenues to the government having jurisdiction.

2. Increased traffic and congestion on nearby roads and in shopping areas.

3. Increased enrollment in the public school system.

4. Increased demand for public services, such as roads and road maintenance, libraries, police and fire protection, water supply and sewage and solid waste disposal.

5. The loss of previous land uses and the values they provided.

6. A temporary increase in development and construction activity.

7. In the case of industrial development, a peak construction cycle and increased and heavier use of local roadways and public utilities, all producing complicated effects on the local economy.

8. Perhaps a transfer in local retail trade income if the new families moving into the area are from another part of town, or a net increase in community income if they are mostly from outside the local area.

9. An irreversible commitment of land that will influence local growth patterns. Alternative uses of the land may be foreclosed. The development may have contributed greater benefits to the total community if it had used land resources elsewhere.

Traditional economic analysis, market economics, concentrates on the payoff to the individual or decision making unit. This economic concept of focusing on payoff also can be applied by the total community through a modified cost and benefit approach. This involves assessing the impact of proposed land uses in terms of detriments and benefits accruing to the community immediately and in the future, and determining how the detriments and benefits will be distributed in the population. This approach can provide information needed to consider a proposed project in terms of its impacts on the total community. Major land use decisions are the most significant determinant of the future environments of cities, towns, and rural areas.

The first step in assessing a development's impact on the community is to define "community." It can be a political or tax jurisdiction, a geographic area or a region. For purposes of fiscal analysis it is helpful to use tax jurisdictions. For large developments it may be desirable to use large geographical areas.

Fiscal impacts are the easiest to define. Obvious benefits include increased tax revenues for the school district, and for the city or county. Demands for schools, sewers, storm drains, police and fire protection, municipal water supply, road upgrading and maintenance and public facilities are obvious public costs. Communities should ask (25):

--How many children will the new development bring, either directly or indirectly?

--Does the present school system have capacity to absorb additional children?

--If not, what will be the cost of additional teachers, staff and supplies?

--Will there be a need for additional buildings and playgrounds? If so, how much will they cost?

--Where will the money come from to meet these increased costs?

--At what stage of development will the community need to install a sewage system, a sewage treatment plant?

--How will the development affect the community water supply? Will additional wells lower the water table and conflict with existing water rights? Can the water supply be increased; at what cost?

--Will additional equipment and machinery be needed? Will additional workers be needed?

--How will the community dispose of the additional waste that will be generated by this development? Where will the community purchase new land fill areas? What will they cost?

--Will the installation of new, or additional, public utility systems mean special assessments for the entire community?

--Will the community's present recreational facilities increase in demand?

--Will any new recreational facilities created by the proposed development be open to the community as a whole?

--Has the community made adequate provisions for parkland and open space?

--If there is a volunteer fire system, will additional demands create a need for a paid staff, or for new fire fighting equipment?

--Will the existing water system provide adequate fire protection?

--Can the police force handle an increase in city population density, or will it have to enlarge to maintain the same quality of protection?

--Will the police or fire departments need a new station, or new equipment--automobiles, motorcycles, call boxes?

--Will the new development eventually force a need for expanded health care of the poor and elderly?

--Will there be a need for additional hospital or clinic capacity? If so, how many people will need to be hired; what buildings will be needed?

--What new roads will have to be built and what old roads will have to be widened, strengthened and paved? How much of the cost of the expansion will the community have to bear?

--Will the community have to supply additional public transportation? Will expansion of transportation requirements mean assessments against the existing population?

--What will be the effects on existing industrial and commercial enterprises, particularly on those in city or town centers?

Fiscal analysis also depends on other assumptions made about the proposed development. How many permanent, seasonal, or short-term (construction) residents are projected? Will they be newcomers or from another part of the same community? How long will it take for the development to be completed? Will the developer merely sell lots or also construct housing? Does the development complement or overload current and planned future community facilities and services? The answers to these questions indicate when the fiscal impacts will occur and whether a lag may exist between demand for public services and the financial ability of the jurisdiction to pay for them.

Another economic benefit associated with development includes an increase in community income due to real estate transactions, legal work, surveying and construction activity, and financing arrangements. Market values also may increase in the local area, and although this may be considered an increase in community wealth it may mean higher property taxes for nearby landowners, depending on local valuation and assessement procedures.

Impacts that are primarily non-economic are determined by the proposed development site, how the location relates to the surrounding community, and the prior use and value of the land. A development's impact on water quality will depend on the proposed source of water and its relationship to local watersheds, water tables, and the existing demands on them. The effect on air quality will depend on many factors including atmospheric conditions, transportation networks, and traffic generation.

The location of a development may be precedent setting and significantly affect future land use patterns of the community. The implications of development location are important and deserve careful study. Development of a scattered rather than compact nature has a pronounced impact on the quality of local wildlife and recreation resources. Valuable wildlife and recreation experiences are dependent on availability, access, and quality of resource. Suburban sprawl and second home development tends to decrease these values. Sprawl also requires many miles of roads, generates additional traffic and increases fuel consumption. Compact urban areas are an effective tool for conserving energy and free much human energy for activities other than commuting.

Rural subdivisions have similar impacts at perhaps greater cost. Lots remain unframed and unoccupied as owners wait out a speculation game. Land speculation confounds public revenue and expense forecasts and often causes land suitable for recreation or agriculture to lay idle. If enough lots remain undeveloped, market values of the property may fall, thus decreasing revenues to the local community.

Non-local ownership of subdivided land affects the timing of local fiscal analysis. Community income generated by non-local vacationers varies with the season and the frequency of use. Public cost estimates are invalidated as "vacation homes" become primary residences. Unforeseen demand can occur for public services, particularly road maintenance, water and sewage systems and schools.

When speculative activity and non-local ownership occur in rural areas attendent detrimental impacts are magnified. Surrounding land values become linked to the success or failure of the development. As the local economy becomes dependent on seasonal recreation it fluctuates unpredictably. Demands for services strain small communities that lack the resources to serve residents of distant subdivisions with roads, health care and police and fire protection. Locally valuable open space, recreation and wildlife resources are diminished and local

social structures and mores are influences by newcomers and vacationers who may not respect community traditions.

The subdivision of agricultural land has substantial economic and non-economic long-term costs. Sustainable agricultural production, open space, and a life-style dependent on a proximity to agriculture--all are foregone. As land values increase due to subdivision acitivity, market values of farm properties also increase in a chain reaction that gobbles up farmland and will eventually result in a decline in the agricultural base of the community and the nation as a whole. In the face of well-documented international food shortages and a U.S. policy of assisting in reducing these shortages, loss of agricultural land has significant national implications.

Whether for industrial, residential, recreational or second home purposes, land use conversions have detriments and benefits affecting the total community. Many of the fiscal and primary economic effects can be quantitively estimated. Other physical and social effects can only be qualitatively discussed. Distributional effects of detriments and benefits must be analyzed over time and among segments of the population: Who will reap the benefits and who will suffer the detriments? Will today's citizens reap and tommorrow's citizens suffer?

Current Literature and Research

Average county-wide mill levies in the seven Montana counties which grew fastest between 1960 and 1970* were compared to average county-wide mill levies for the state as a whole. Mill levies are the taxes levied per dollar of valuation; they give an indication of changing tax burden over time. The mill levies used included state, county and school levies. Table 11 demonstrates

*Missoula, Gallatin, Flathead, Lewis and Clark, Ravalli, Cascade and Yellowstone. Lincoln County would have ranked among the list of seven but was excluded because its growth was caused primarily by the construction of Libby Dam, an isolated project. Ranking is based on 1970 federal census.

that in the seven fastest growing counties the average tax increased 38.2 mills, while statewide taxes increased 30.2 mills in an average county. Hence the seven counties had a tax increase 25 percent greater than average for the state.

TABLE 11 (19, 20)

Average County-wide Mill Levies

	1964	1972	Difference
Statewide	107.73	138.13	30.4
7 Counties	116.45	154.65	38.2

These results contradict the often-heard contention that growth leads inevitably to increased economies of scale in financing community public services.

Final determination of the relationships among rate of growth, population size and taxes awaits further research, and must include consideration of the quality of services provided. In the example above, quality of services was not considered.

Few current subjects produce more controversy than those dealing with the costs and benefits associated with community growth. Fundamental questions concerning how one computes costs and benefits as well as how one should make final comparisons are just two issues that remained unresolved. In addition, what factors need to be taken into account when conducting cost-benefit studies is unclear.

Resolving these issues is beyond the scope of this study. But Montana county commissioners are increasingly concerned about the costs of growth in their jurisdictions. One effort to help local decision makers and the public learn what new subdivisions may cost, in terms of additional public services, is the environmental assessment procedure established by the Department of Intergovernmental Relations in carrying out the provisions of the Montana Subdivision and Platting Act. Under this process, developers must provide the commissioners with detailed information on what additional services a project would require and who would be asked to bear the costs. (See Sub-chapter 22 of Title 22, Montana Administrative Code.)

What follows is a brief summary of some recent studies that have tried to specifically address the costs of growth. To some extent these studies try to lay open the same issues intended to be addressed in the subdivision environmental assessments. The summaries are presented to acquaint readers with the variety and scope of research currently under way.

A. Impacts of Large Recreational Developments Upon Semi-Primitive Environments: The Gallatin Canyon Case Study (26), investigates the effects of the Big Sky real estate development on the Gallatin Canyon and Gallatin County in southwestern Montana. Principal economic conclusions of the study follow:

1. From 1970 to 1974 the average price per acre for tracts less than 40 acres lying outside city limits rose to about $5,600 from $3,000, an increase of 87 percent.

2. From 1969 to 1975, annual maintenance costs for U.S. Highway 191 are projected to increase to $152,000 from a base of $103,000 annually.

3. Improvements at Gallatin Field, the Bozeman airport, are expected to require $10.3 million over the next 16 years.

4. Enrollment at Ophir School (District No. 72) increased from 10 pupils in 1970 to 62 in early 1974. The school budget jumped to $40,000 from $8,500 during the same period. Levies in the school district jumped from 140.16 mills in 1970 to 185 mills in 1974, a 32 percent rise.

5. Since 1970, about $7 million has been added to local payrolls.

6. A 1973 sample of attitudes expressed by fishermen and hunters found that 68 percent of the anglers and 78 percent of the hunters feared that the Big Sky project would harm the quality of their recreational hunting and fishing experiences.

B. A research project (27) by five University of Montana seniors under the direction of Professor Arnold Bolle, School of Forestry, investigated selected economic impacts of two subdivisions near Lolo, Montana: Lakeview Addition, and Bailey's Trailer Court. The study found that:

1. Of the 143 occupied dwellings in Lakeview Addition, families sent 144 students to grade school in Lolo and 36 students to high school in Missoula, generating a total increase in school operation and maintenance expenditures of $125,684. In 1973, the residents paid $57,327 in property taxes, 68 percent of which ($38,982) went to the public school system, according to the county commissioners. Simple subtraction reveals a net financial drain on the school systems of about $88,000.

2. In Bailey's Trailer Court, owners of 60 mobile houses paid $5,520 in personal property taxes in 1973. The real property tax on the trailer court itself was $989. Hence total taxes were $6,509 on the trailers and the court, 70 percent of which ($4,556) went to education. Residents of Bailey's Trailer Court sent 51 students to school in Lolo, costing the school district $31,212; one student attended Sentinel High School in Missoula, costing that district $1,071. Subtracting the $4,556 paid in school taxes from the total school system costs of $32,283 reveals a financial drain of almost $28,000.

C. Economic information continues to be gathered about the impact of large-scale industrial development on the town of Colstrip in southwestern Montana. Workers are building two 350-megawatt coal-fired power plants in a previously rural setting. Here are some highlights:

1. Federal projections of "most likely" coal developments predict an increase of 6,000 residents by 1985, 1,500 percent more than in 1970. Compared to 1973-'74 school year records, school enrollment will increase 470 percent by 1985 to 1,600 students, requiring capital expenditures of $6.4 million. Two thousand housing units will be required by 1985, not counting the temporary demands of construction families (28).

2. The Colstrip school district budget has increased from $276,647 (1972-'73) to a projected $976,914 for 1974-'75. The budget projects a per-student cost of $1,062, an increase over the current $1,028 (29).

3. Taxable valuation in Rosebud County increased 32 percent from 1973 to 1974, to $26.65 million. Power generating facilities now nearing completion contributed only 26 percent of the increase (30). Colstrip school district mill levies increased 13 percent between 1972 and 1974, from 114.2 mills to 129.3 mills (30).

D. Local Tax Impact of Recreational Sub-Divisions, A Case Study (31). This is a study of a "recreational, rural-residential" subdivision of 1,300 acres into 1,850 lots in central Oregon. Its principal conclusions:

1. Currently there are 67 improved lots, 26 year-round dwellings, 23 public school students and three community college students. Subdivision contributed $82,000 in county and school district property tax revenues with a mill rate of .2259. Estimated costs of local government public services to the subdivision, including school and community college, were $25,255, with a result of a net fiscal contribution of $56,745.

2. Assuming 50 percent development and a constant mill levy, the analysis would discover a net fiscal deficit of about $93,000. To cover the deficit the county-wide mill levy would have to reach .2388.

3. At full development, the fiscal deficit would reach $293,748. The mill levy would have to increase to .2627.

E. Exploring Options for the Future: A Study of Growth in Boulder County, Vol. V. (32). Some of this study's conclusions:

1. Boulder, Colorado, per capita city government expenditures in constant (1967) dollars increased from a 1950-'53 average of $42.80 to a 1968-'70 average of $75.30, a 76 percent jump during the city's expansion.

2. During the period analyzed, per capita income also increased, from $1,899 in 1950-'53 to $2,851.70 in 1968-'70, a 50 percent increase in constant dollars.

3. Comparing per capita city expenditures with per capita income, spending increased 1.5 times faster than income of the taxpayers.

F. The Costs of Urban Growth: Observations and Judgments (33). This study offers a summary of available information on the costs of growth. A summary of its conclusions:

1. On the average, large communities and fast growing ones cost more money per capita to operate than do small ones and slowly growing ones. If there is an optimum community size for maximum governmental efficiency, it appears to be in the neighborhood of 25,000 people. If there is an optimum growth rate for the same purpose, it appears to be close to zero, since any rate higher than this leads to higher per capita costs.

2. On the average, the quantity and quality of public services is adversely affected by large population size and by high population growth rate. Contrary to popular belief, public services appear to be better in small and slowly growing communities than in large and fast growing ones.

3. Colorado Springs, during two decades of rapid growth, suffered the same costs that fast growing cities generally suffer: increasing tax rates (at constant dollars), declining quality of services, decreasing average per capita income (relative to the national average), and increasing congestion and crime.

G. The Direct Costs of Growth (34). This study compared information on 34 Colorado counties, excluding Denver County, divided into three groups: 12 "growth," 11 "stable," and 11 "declining" counties, based on population changes between 1960 and 1970. Principal conclusions:

1. Analysis of per capita expenditures by all local jurisdictions within any single counties (including counties, municipalities, school districts and special tax districts) revealed that total per capita

expenditures increased in each of the three groups during the study period but in varying amounts: Growth Group; 46.7 percent; Stable Group, 50.6 percent; and Declining Group, 40 percent.

2. This table shows total expenditures as a percentage of adjusted gross personal income at beginning and end points of the study period:

Change in Per Capita Expenditures (percent)

Group	1960	1970
Growth	12.5	12.2
Stable	15.6	17.1
Declining	27.3	26.9

LAND USE POLICY TODAY: PIECING IT TOGETHER

Montana has a land use policy. But it is implicit, hidden away in the nooks and crannies of the law and of the administrative codes of the many agencies of state government. For the people, the legislature, and the governor, an unstated policy is hard to evaluate. It is difficult to suggest changes in an unstated policy or use it to measure the efforts of state agencies.

Montana has policies at two levels. There are policies which direct the state agencies and there are policies which establish and guide the actions of local government in the land use area.

State Agency Review

Seven state agencies* administer the bulk of law in which Montana's unstated land use policy can be discovered. Montana's legislature, like many others, has attached declarations of state policy to many laws to direct their force to a specific function or area. Taken together all these isolated policy statements comprise an expression of legislative policy. But the legislature has rarely considered the interaction of one policy statement with another. Within the overall policy there are many contradictions and inconsistencies. No means has been provided to resolve these conflicts. Conflict resolution must await the action of the governor, the courts, or the legislature. This does not have to be so. The legislature could establish clear priorities and procedures for implementing a consistent state policy with regard to the use of land.

State land use policy directs the use of state-owned land and the actions of state agencies which influence the use of private lands. Private land use decisions can be affected directly by state policy. through regulation, and indirectly through the secondary effects of decisions made concerning state lands and projects.

*The Departments of Fish and Game, Health and Environmental Sciences, Highways, Intergovernmental Relations, Natural Resources and Conservation, State Lands, and Revenue.

For example, the state directly affects the use of certain subdivided lands through its review of sanitary facilities. Whereas a decision to locate a highway interchange affects directly only the land on which it is built, it may indirectly affect the use and value of the land in a wide surrounding area.

Many of Montana's state agencies exercise these direct and indirect influences over the use of the state's land. The seven reviewed in this study exercise most of that influence.

THE FISH AND GAME COMMISSION

The Fish and Game Commission, acting through the Department of Fish and Game, has been granted a broad range of powers to influence and control the use of land in Montana. This range of powers implements a state policy of providing perpetual hunting and fishing opportunities to the residents of the state. The 1965 legislature declared:

> It is hereby declared to be the policy of the state of Montana that its fish and wildlife resources and particularly the fishing waters within the state are to be protected and preserved to the end that they be available for all time, without change, in their natural existing state except as may be necessary and appropriate after due consideration of all factors involved (Section 26-1501, R.C.M., 1947).*

This policy has been applied directly to any action by a state agency or political subdivision, such as counties and cities, which might affect the natural form of a streambed or its banks. All agencies and political subdivisions are required to file notice, plans and specifications of such action with the department before commencing construction. If the department finds that the proposed project adversely affects any fish or game habitat it must recommend modifications or alternatives to mitigate the effects. If the agency proposing the project refuses to comply with the recommendations, the department may have the dispute

*Hereafter in this section reference to the codes of Montana will be made parenthetically by section number only.

submitted to binding arbitration by three residents of the county or counties where the project is located. The arbitrators are selected by judges of the local district court.

The legislature also has clearly stated the public's right to use navigable waters, whether the water crosses public or private land, for fishing (26-338), and has directed the department to obtain hunting and fishing rights on lands surrounding federal wildlife preserves and refuges (26-1120).

The legislature has indicated, however, that the policy of the state is to provide hunting and fishing opportunity without placing additional burdens on local taxpayers. In counties where the department holds more than 100 acres of land it is directed to pay "in lieu of taxes" the amount the county would be due in taxes if the land were in private ownership (26-133). In obtaining hunting and fishing rights around federal preserves and refuges, the department is authorized to compensate landowners for those rights. And when rights granted Fish and Game to control waters on state owned lands for the propagation of fish diminish the value of the land around those waters to a potential buyer, the rights granted the department may be terminated on notice to the commission (26-118).

The department also is charged with the preparation of the Statewide Outdoor Recreation Plan and the delineation and maintenance of state parks, monuments, and recreation areas and exercises direct control over the use of such lands. By this mandate the legislature clearly established a state policy regarding the conservation of "scenic, historic, archaeologic, scientific, and recreational resources of the state, and for providing for their use and enjoyment, thereby contributing to the cultural, recreational, and economic life of the people" (62-301). The location of a state park, monument or recreation area can significantly affect use of surrounding lands.

The State Antiquities Act (enacted in 1973) is administered by the department to provide for the "identification, acquisition, restoration, enhancement,

preservation, conservation and administration of the historic, archaeological, paleontological, scientific, and cultural sites and objects of the state of Montana" (81-2502). The department is given, with the agreement of the state Historical Society and the state Board of Land Commissioners, direct control over state lands for the purposes of the Antiquities Act. The land board may withdraw or reserve additional state land as needed to protect a site or object registered under the act. No state land may be sold or developed if such action will disturb a site or object registered under the act. The legislature has declared the care and management of antiquities "a worthy object of the trust as specified in [the section of the codes ascribing powers and duties to the Board of Land Commissioners]" (81-2504).

The legislature also has authorized Fish and Game to enter into agreements with private landowners to provide for the protection or registration of sites and objects on private lands and has directed the department to use the courts if necessary to prevent the waste, removal or destruction of a registered site or object. A court may grant an injunction for up to a year and meanwhile, the department may be directed to present to the parties involved a plan for the protection of the site or object (81-2510).

In addition to the direct controls granted to the department, Fish and Game administers and enforces a number of laws which, in achieving certain policy objectives indirectly affect the use of land. Chief among these indirect influences is the power to set and enforce hunting and fishing seasons and catch limits and to expend funds for the protection and propagation of fish and game and non-game animals.

Fish and Game wardens are authorized to enforce state laws pertaining to criminal mischief, trespass and littering (32-4410) on private lands opened to the public for recreation (26-110.1). In addition, wardens enforce laws prohibiting harassment of game or livestock by snowmobiles (53-1020), and driving vehicles off roads or trails without permission (26-301). The department also may offer several

forms of relief to private landowners whose property is subject to excessive damage from wildlife.

These laws and others like them indicate an unstated policy to induce landowners to open their lands to the public in exchange for services provided by the state. In fact, the whole body of laws administered or enforced by the Department of Fish and Game embodies a state policy on outdoor recreation, hunting and fishing. Unfortunately, the legislature has failed to clearly establish the relationship of the policies administered by Fish and Game to other policies the legislature has promulgated. Even in the one instance where the legislature has provided a procedure to identify and resolve interagency conflicts no guidance is given to the arbitrators: what they are to consider in their decision is left to their discretion.

THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

The Department of Health has little direct control over the use of land in Montana; however, the regulatory and licensing authority it exercises has substantial indirect effect on land use.

The legislature has charged the state Board of Health, acting through the Department of Health and Environmental Sciences, with the regulation of various land uses that are of only minor significance in terms of this study. The department has the sole responsibility for the preparation and administration of a comprehensive health plan for the state and thus is involved with the siting of nonprofit hospitals and other health facilities. Tourist campgrounds and trailer courts require a license from the department but review of their applications is limited to sanitation and the protection of public health (69-5602 and 69-5601).

In addition, the legislature has declared "the public policy of this state to control refuse disposal areas to protect the public health and safety" (69-4001). Private refuse disposal areas must obtain a license from the department and public facilities must meet requirements outlined in the law. No agency is charged

specifically with long-term solid waste planning for the state.

The department also supervises local boards of health which, among other duties, are responsible for abating public nuisances affecting health. The broad definition of nuisance in the statutes could permit such abatement to have a significant impact on land use: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" (57-101). This is the law cited by the new residents of a rural subdivision when they wish to force a dairy, hog farm or other agricultural operation out of their area by alleging that the farm is a public nuisance. Montana's nuisance law was enacted in the late 19th century and has not been substantially amended since then. The policy implications of the law have been left to the courts and the department.

Water

The 1967 legislature dictated firm policy on the quality of public water supplies and directed the Department of Health and Environmental Sciences to implement that policy: "to protect, maintain, and improve the quality and potability of water for public water supplies and domestic uses" (69-4901).

The same legislature protected other waters of the state by another broad policy statement:

> It is the public policy of this state to:
>
> a) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aqautic life, agriculture, industry, recreation, and other beneficial uses;
>
> b) provide a comprehensive program for the prevention, abatement, and control of water pollution (69-4801).

The definition of water pollution is quite broad and includes any substance, "likely to create a nuisance or render the waters harmful, detrimental, or injurious to public health, recreation, safety, welfare, livestock, wild animals, birds, fish, or other wildlife" (69-4802). Protected state waters include any body of surface

water, irrigation and drainage systems, and underground water. The legislature also declared that it is not necessary for wastes to be rendered more pure than the natural condition of the receiving water. "Natural" has been defined to include pollutants from runoff or percolation over which man has no control or material from developed areas where all reasonable soil and water conservation practices have been applied (69-4801).

The legislature's directions to the Board of Health describe a specific policy of maintaining the highest practicable water quality while giving consideration to the water's "most beneficial use," and social and economic costs. Sec. 69-4808.2 directs the board, among other things to:

1. Formulate standards of water purity and classifications of water according to its most beneficial uses, giving consideration to the economics of waste treatment and prevention.

2. Require that any state waters whose existing quality is better than the established standards as of the date on which the standards become effective, be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change is justifiable as a result of necessary economic or social development and will not preclude present and anticipated use of these waters.

The Department of Health and Environmental Sciences administers a permit system covering the discharge of sewage, industrial and other wastes into state waters and may impose limitations on their volume, strength or other characteristics. In the administration of the water pollution control laws, the department and board are advised by the state water pollution advisory council, which is composed of public and private representatives having special interest in the problem of water pollution control.

The board and the department have also been designated by the governor, and as of June 10, 1974, by the U.S. Environmental Protection Agency, as the agency to administer the provisions of the Federal Water Pollution Control Amendments of 1972,

within Montana. In passing this law Congress established as a national objective the restoration and maintenance of "the chemical, physical, and biological integrity of the Nation's waters," and recognized that the primary responsibility to prevent, reduce, and eliminate pollution, and to plan the development and use of land and water resources lies with the states (33 U.S.C. 1251).

There are two programs under the federal legislation which significantly affect water pollution control efforts in Montana. The first, compilation of Water Quality Management Plans, requires a planning process for waste monitoring and treatment on an area-wide or regional basis throughout the state. The department's Water Quality Bureau, in compliance with federal requirements, is preparing plans for waste treatment needs in 16 Montana river basins and establishing a 20-year regulatory program. A significant consideration in the process is the identification of agriculturally and silviculturally related pollution, including runoff from manure disposal areas and from land used for livestock and crops. Also to be identified are mine-related pollution sources, including runoff from surface and underground mines (33 U.S.C. 1288). The plans are to establish priorities for waste treatment facilities and may include guidance for their location. Any plan for guiding water treatment facilities will affect profoundly the rate and direction of growth of an area. Yet coordination with local residents, local governments and other state agencies is not well-provided for in this law. The department has, on its own, begun procedures for involving citizens in the planning process. The state legislature, however, currently has no direct invlovement in this process.

The second program, the National Pollutant Discharge Elimination System, now the Montana Pollutant Discharge Elimination System or MPDES, requires state permits for the discharge to surface or underground waters of domestic sewage, industrial wastewaters and wastewaters from confined animal feedlot operations and large irrigation districts.

The system includes the rules and regulations established under the Montana

water pollution control act (69-4801 et. seq.) and expands the policies of that act to additional areas covered by the federal act.

Air

The 1967 legislature also assigned air pollution control responsibilities to the department and Board of Health and Environmental Sciences under the Clean Air Act of Montana. With this act the legislature declared a strong policy:

> to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state and facilitate the enjoyment of the natural attractions of this state (69-3905).

The policy statement further affirms a need for a distribution of responsibility and coordination between state and local governments to balance health, economic and social values in the public interest.

The definition of "air pollution" in the statute indicates the breadth of the application of the policy: "the presence in the outdoor atmosphere of one or more air contaminants in a quantity and for a duration which is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life, property, or the conduct of business" (69-3906).

The department and board are granted powers to establish standards and regulations under the law. Sec. 69-3913 allows stringent air quality standards in those areas of the state where pollution sources or population are concentrated, or where the nature of the local economy, land and land use so requires. Citizen involvement is through the air pollution control advisory council and the hearing process authorized by the administrative codes.

Montana's air quality regulations and standards are among the most stringent in the nation. They appear to be in compliance with the policy of the legislature.

Additional authority for air pollution control comes from the federal Clean

Air Act Amendments of 1970. The act established national air quality standards and requires states to prepare an implementation plan to attain air quality at least equal to the standards. If a state fails to comply, the U.S. Environmental Protection Agency (EPA) will prepare a plan for the state. The plan must include procedures to prevent projects that would violate the standards.

This implementation plan, prepared by the Department of Health and Environmental Sciences and approved by the governor as required by federal law, has been mired in procedural and jurisdictional complications since January, 1972. The plan, however, makes this policy statement:

> it is hereby declared to be the policy that ambient air whose existing quality is better than the established standards, will be maintained at that high quality unless it has been affirmatively demonstrated to the Department of Health and Environmental Sciences of the State of Montana that a change is justifiable as a result of necessary economic and social development vital to the state (p. 6, Implementation Plan for Control of Air Pollution in Montana, Department of Health and Environmental Sciences, revised June 30, 1972).

Two 1973 federal court decisions* have greatly influenced the Clean Air Act's impact on the use of land. The first case requires states to consider the cumulative atmospheric impact of development and in particular, to control major facilities which may be pollution-free themselves but will contribute to localized air pollution violations by attracting large numbers of motor vehicles.

Because case-by-case review would be inadequate to control this long-term incremental air quality degradation, the EPA is requiring states to prepare plans for those areas which have the potential to exceed air quality standards in the next 10 years. The plans must consider impacts on air quality from a regional perspective and it is likely that portions of many of the plans will concern patterns of land use. The department has declared eight Air Quality Maintenance Areas in Montana and is beginning to prepare plans for them. Coordination with

*Natural Resources Defense Council v. E.P.A., 475 F.2d 968 (D.C. Cir 1973) and Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd sub nomine Fri v. Sierra Club, 412 U.S. 541 (1973).

other state agencies and local governments apparently is informal so far.

The second court case concerns EPA's position on the protection of areas where existing air quality exceeds minimum national standards. The U.S. Supreme Court affirmed a lower court's ruling that "significant deterioration" of air in these areas must be prevented. It has taken the EPA a year to propose regulations to comply with the high court's ruling.

The EPA recognizes that preventing significant deterioration of air quality is likely to have a major influence on land use. Land use planning is of necessity a complex process including many variables, only one of which is air quality. In the opinion of the EPA administration, regulation of land use based on air quality as the single overriding factor is not desirable for most areas of the country. The EPA has proposed regulations to "inject consideration of air quality into land use decisions, but not to mandate land use decisions based solely on air quality... not to restrict or prohibit economic growth, but rather to ensure that desirable growth is planned and managed in a manner which will minimize adverse impacts on the environment" (35).

Recognizing that minimum air quality standards must be achieved throughout the nation, the question of what is "significant" deterioration of air quality becomes largely subjective. Varying social, economic, and environmental characteristics will result inevitably in varying definitions of "significant."

Under proposed EPA regulations, the states would be delegated the responsibility to prevent the significant deterioration of air quality and could re-delegate this responsibility to local government. The EPA would encourage this re-delegation. For those states unwilling to accept the responsibility, the EPA would enforce the law. In any case, the EPA would retain some review authority.

How Montana will respond to EPA's non-degradation rules is up to the executive branch; in particular, to the Board and Department of Health and the governor. Any decision by the state would have significant land use, social and economic

effects. Is the Department of Health and Environmental Sciences the agency to consider, weigh and decide such far-reaching questions? What policies will its decisions follow? Firm answers cannot be offered now.

Subdivisions

Another area with significant land use implications is sanitation in subdivisions. The 1967 and 1973 legislatures have declared a clear policy:

> It is the public policy of this state to extend present laws controlling water supply, sewage disposal, and solid waste disposal to include individual wells affected by adjoining sewage disposal and individual sewage systems to protect the quality and potability of water for public water supplies and domestic uses; and to protect the quality of water for other beneficial uses, including uses relating to agriculture, industry, recreation and wildlife (69-5001).

Before a subdivision plat may be filed with a county clerk and recorder, the department and the local health officer having jurisdiction must certify that the subdivision lots are free of "sanitary restrictions." Until the restrictions are removed, the subdivider may not sell any lot, or erect any building or shelter requiring water supply, sewage or solid waste disposal facilities. If the restrictions are made conditional, then no permanent building requiring sanitary facilities may be occupied until the conditions are met.

The department has rules, including sanitary standards, for the enforcement of the law. However, the department's interpretation of the broad policy and rules set forth by the legislature (Sec. 69-5005) has resulted in significant and unproductive conflict between the department and those concerned with the protection of the environment. Some contend that the department has neglected those sections of the policy and rules calling for the protection of water quality "for uses relating to agriculture, industry, recreation, and wildlife," and that the department appears concerned only with drinking water. As a result, the department has been taken to court twice in the last year.

The policies of the body of law administered by the Board and Department of Health are clearly policies favoring strong environmental protection. The

procedures required by the 1971 amendments to the water pollution control act, demanding affirmative proof to the board that a decrease in water quality is justifiable as a result of "necessary economic or social development," also are commendable. But the legislature has yet to determine what constitutes "justifiable" or "necessary" development.

In addition, although mentioning wildlife in several policy statements, the legislature has failed, judged by the action of the department, to provide sufficient guidance for the inclusion of wildlife protection in administrative decisions of the department.

With respect to overall state policy, the legislature has failed to provide for the coordination of the legal policies administered by the board and department with the policies of laws administered by other departments.

THE DEPARTMENT OF HIGHWAYS

During 1973 the Montana Department of Highways, acting under the policy direction of the Highway Commission, spent more than $80 million on highway construction projects. The commission and the department operate under an extremely broad legislative policy directive. The 1965 legislature declared that it intended:

> (1) To place a high degree of trust in the hands of those officials whose duty it is, within the limits of available funds, to plan, develop, operate, maintain and protect the highway facilities of this state for future use.
>
> ...
>
> (3) That the state shall have integrated systems of highways, roads, and streets, and that the department of highways, the counties and municipalities assist and co-operate with each other to that end.
>
> (4) To provide sufficiently broad authority to enable the highway officials at all levels of government to function adequately and efficiently in all areas of their respective responsibilities, subject to the limitations of the constitution and the legislative mandate hereinafter imposed (32-2202).

The location of highways, and the provisions of access to them, has a profound effect on the patterns of land use, the social structure, economy and environment

of an area. The law expresses little recognition of these significant impacts of highway development.

The legislature has recognized: the undesirable interaction of highways and livestock and so has provided for highway fencing, stock gates and stock passes (32-2426); the enjoyment derived from scenic surroundings while traveling and so has provided for the use of federal money to purchase scenic easements (32-2423), and the economic impact of highways and so has provided for the designation of economic growth centers (32-2620). Economic growth centers may be designated by the governor with the approval of the secretary of the U.S. Department of Transportation. Once designated, economic growth centers receive priority in appropriation of state matching funds for primary, secondary, and urban highways (32-2622).

The highway department has also been granted authority to regulate certain land uses near highways. Junkyards within 1000 feet of the right-of-way of interstate and primary roads require a license issued by the Department of Health and Environmental Sciences with the concurrence of the Department of Highways. The erection of outdoor advertising within 660 feet of the right-of-way is regulated by the Department of Highways under regulations adopted by the Highway Commission.

The enormous indirect effects of highways on land use decisions go unmentioned in the codes. Not even the advertising unit of the highway department is guided[1/] by legislative policy. The unit evolved out of a legislative directive (32-1614), since repealed, directing the department to prepare an offical highway map.

Access

The indirect effects of a highway are determined by its location and by the accesses provided. The legislature has declared that it is the policy to:

> facilitate the flow of traffic and promote public safety by controlling access to:
> (1) Highways included by the federal highway administration [roads] in the national system of interstate highways.

(2) Throughways and intersections with throughways.
(3) Such other federal-aid and state highways as shall be designated by the commission in accordance with the requirements set forth in this chapter (32-4301).

Any portion of interstate highway may be designated for controlled access by resolution of the commission. The commission must find that it is "necessary and desirable that the rights of, or easements to access, light, air, or view be acquired by the state so as to prevent such portion [of the highway to be designated "controlled access"] from becoming unsafe for or impeded by unrestricted access of traffic from intersecting streets, alleys, public or private roads or ways of passage" (32-4303). Whereas, in the past, this authority has been exercised only in the case of interstate highways, many primary road projects now are being designed for limited access.

The policies of the department and commission, listed in the Montana Administrative Codes (MAC, 18-2.6AI(1)-S607), attempt to establish access standards "which will tend to reconcile and satisfy the needs and rights of both the property owner and the highway user." The department requires that a permit be requested from its Maintenance Division for any new access or for the reconstruction of existing access on any highway under the Federal Aid System (interstate, primary or secondary).

The highway department has not taken it upon itself, nor has the legislature directed, that the land use effects of access be considered. Access decisions have been based solely on highway engineering and the interests of the "motoring public."

Location

Highway location decisions probably always have been controversial. The Montana legislature has addressed this issue in very limited areas. For example, Sec. 32-1628 prohibits the department from constructing or relocating a highway so as to cause traffic to bypass an incorporated municipality unless the highway is part of the interstate system, or the governing body of the municipality consents.

In response to an increasing public awareness that highways affect many values in addition to travel time and motorist convenience, Congress included in the Federal Aid Highway Act of 1970 (23 U.S.C. 101, et seq. (1970)) stipulations that all impacts of federally assisted highway construction be considered in planning and design decisions. Congress directed the secretary of the U.S. Department of Transportation to:

> assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest (23 U.S.C. 101, at Sec. 109 (h)).

This language also was intended to meet the environmental impact statement requirements of the National Environmental Policy Act.

The Montana highway department has prepared an Action Plan in response to the rules promulgated by the U.S. Department of Transportation. The Action Plan, in part, declares it to be the policy of the Department of Highways that:

> ...full consideration be given to economic, social and environmental factors in the planning and design of highway projects.
>
> ...provisions for ensuring the consideration of economic, social and environmental factors be incorporated in the decision making process utilizing a systematic, interdisciplinary approach.
>
> ...decisions on highway project planning and design be made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing possible adverse economic, social, and environmental effects (Sec. 2.1, Montana Action Plan).

The Action Plan helps identify social, economic, and environmental effects of a project. Specifically, the department must assess the impacts of alternative highway locations and designs and consider a number of factors, including regional and community growth, conservation and preservation, public facilities and services, and aesthetic and other values.

Whether the plan embodies a policy, with respect to land use, consistent with that desired by the people of the state as expressed by their legislature, remains

a question. Because the department is itself in a policy transition stage, independent analysis of what constitutes highway department land use policy is difficult. Historically, the department expressed disbelief that its actions could have any influence on land use and saw its mandate as simply highway construction. Recently, the department has realized that these notions are inconsistent with reality and with other policy declarations of the legislature. Yet in the absence of explicitly stated priorities and with access to large sums of federal money the department remains in a position of determining its own policy.

There remain two significant considerations that to some extent subvert Action Plan policies. The routing of a secondary highway is determined pursuant to the Action Plan, but the decision on its beginning and end points is made primarily by the Board of County Commissioners requesting the highway. Secondly, although substantial portions of the interstate highway system remains to be constructed here, essentially all of Montana's interstates were planned and located before the Action Plan was developed and do not reflect its policies.

THE DEPARTMENT OF INTERGOVERNMENTAL RELATIONS

In the authority exercised by the nine divisions of the Department of Intergovernmental Relations are both direct and indirect means of influencing the use of land. The legislature has directed the department to administer "laws pertaining to relationships between the state and local and federal governments" (82A-901.1) and the department was organized to provide liaison and services to local governments.

Most of the department's land use related functions that can be traced to a statutory base come from the Planning and Economic Development Act of 1967, which created a Department of Planning and Economic Development. In this act (as amended) the legislature declared:

> Community planning, greater diversification, and attraction of additional industry, accelerated development of natural resources, expansion of existing industry, creation of new uses for agricultural products...are all necessary in order to create additional employment opportunities, increase personal income, and promote the general welfare of the people of this state (82-3702).

Under the act the department was directed to adopt a comprehensive plan for the physical development of the state; prepare long range plans for economic and resource development; locate and maintain information on prime sites for industrial, agricultural, mineral, forestry, commercial, and residential development, and on sites of historical importance, and make recommendations for protecting and preserving those sites; and consult with, coordinate, and advise state agencies and local planning commissions with respect to land use, demographic and economic studies, and comprehensive plans (82-3705).

When the Department of Intergovernmental Relations was created, the Department of Planning and Economic Development was made a division and then, through the Administrative Codes, split into three divisions: Planning, Economic Development and Research and Information.

Aeronautics

Of the divisions of the department, the Aeronautics Division exercises the most direct control over land use. With the policy guidance of the Board of Aeronautics, the division operated the 10 state-owned airports and assists in planning, funding and designing airports owned by local governments. The division also supervises the in-state use and disbursement of federal airport assistance funds.

The legislature has given the division a single-purpose mandate to "encourage, foster, and assist in the development of aeronautics in this state and to encourage the establishment of airports and other air navigation facilities" (1-204). The codes do not suggest criteria for the establishment or abandonment of airports except to designate, expand, and modify a state airways system to best serve the interests of the state (1-204).

The legislature has recognized the need to eliminate or prevent dangerous obstructions in the air space surrounding airports. Within Secs. 1-701 to 1-723 there are two statements by the legislature on airport hazards.

Sec. 1-704 requires a permit to erect any structure or grow any natural thing within two miles of an airport and prohibits the issuance of a permit if the height of the structure or object would exceed the limits fixed by law. Sec. 1-703 makes it the duty and authority of governing bodies controlling airports to enforce the provisions of the law, but the permit system has been ignored generally.

Secs. 1-710 to 1-723, enacted by the 1947 legislature, authorize every local government having an airport within its jurisdiction or controlling an airport to adopt, administer and enforce airport zoning regulations for airport hazard areas. The legislature has declared that an airport hazard is one that "endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also...[tends] to destroy or impair the utility of the airport and the public investment therein" (1-711).

A local government owning or controlling an airport affected by a hazard located outside its territorial limits may adopt joint airport zoning regulations with the local government in whose territory the airport or hazard is located. If that local government fails to cooperate in adequate airport zoning regulations, the affected local government may adopt and enforce regulations for the airport hazard area in question. If a conflict occurs among airport zoning regulations the local government owning or controlling the airport shall prevail (1-712). If a conflict occurs between airport zoning regulations and other regulations governing the same area, the more stringent regulations shall prevail (1-713).

Airport zoning regulations are adopted like any comprehensive zoning regulation. The legislature has provided for permits and variances, an airport zoning commission, and a board of adjustment.

Housing

The Housing Division of the Department of Intergovernmental Relations was created administratively and is "responsible for the delivery, conservation, planning, and promotion of housing, especially as applicable to persons of low and moderate income...[and] assists in the organization and development of local housing authorities, non-profit sponsors, and local, state, and federal housing planning groups" (MAC, 22-2.1-0100, page 22-5).

The division is attempting to develop a program for financing the construction of low and moderate-income housing. Such a program could have significant effects on land use decisions, but the legislature has offered no policy guidance to the division.

Economic Development

The Economic Development Division has assumed the mandate of the policy statement of the Planning and Economic Development Act of 1967 (quoted above). The division identifies opportunities for industrial, manufacturing, recreational and agri-business potentials within the state and encourages developers to pursue these opportunities. The division also provides technical assistance to local governments and organizations on development programs.

The legislature has offered this division no guidance on the development desired in the state or on the aspects, other than economic, which should be considered in promoting development.

Planning

The Planning Division has assumed the non-economic planning functions outlined in the Planning and Economic Development Act of 1967. Because the policy of that act pertains almost exclusively to economic development planning, the division essentially functions without legislative policy guidance. The act does direct the development and adoption of a comprehensive plan for the state, but provides no guidelines or purpose for the plan. Similarly there are no statutory

guidelines for intra-departmental cooperation or inter-departmental coordination of functional planning.

The division has emphasized local planning assistance but is now moving to fill a larger role. The division administers the U.S. Department of Housing and Urban Development's "701" planning grants and offers assistance to local governments in the establishment of planning boards. A significant new mandate given the division by the 1973 legislature is the administration of the Montana Subdivision and Platting Act. In the act the legislature expresses clear purpose with regard to the regulation of subdivision:

> It is the purpose of this act to promote the public health, safety and general welfare by regulating the subdivision of land; to prevent overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; [and] to encourage development in harmony with the natural environment (11-3860).

The act directs the division to prepare minimum subdivision regulations including detailed criteria for environmental assessments to be submitted by all subdividers. The environmental assessment must include a discussion of the natural characteristics, such as hydrology, soils, vegetation, topography and wildlife, of the area to be subdivided. It must report the anticipated effects of the subdivision on local services. Local services to be considered include schools, roads and road maintenance, water supply, sewage and solid waste disposal facilities, fire and police protection (11-3863).

The governing body of every county, city and town is directed to provide for the enforcement and administration of subdivision regulations "which meet or exceed the prescribed minimum requirements" by July 1, 1974, or the Planning Division must promulgate regulations to be enforced by the governing body as of January 1, 1975 (11-3863).

The division also must offer a process for the review of preliminary subdivision plats by state and local government agencies and affected public utilities.

The comments and recommendations generated by the review process are transmitted to the local government having jurisdiction over the subdivision.

The local government must hold a public hearing and decide to deny, approve or conditionally approve a subdivision within 60 days of receiving the preliminary map unless the developer agrees to an extension. The legislature has directed the local governing body to review the subdivision "to determine whether it conforms to the local master plan if one has been adopted...to the provisions of this act [the Montana Subdivision and Platting Act], and to rules and regulations prescribed or adopted pursuant to this act" (11-3866). The legislature has neither prescribed the procedure for review nor limited review to these three items, nor prescribed the concern to be given to each. In fact, there is no provision to insure that the three items are even considered.

Provisions of the act implement a policy of granting local governing bodies that accept their responsibilities greater latitude in their actions. The act provides that governing bodies taking a strong and active role in the regulation of subdivisions may exercise flexibility with regard to the requirements for an environmental assessment and the dedication of parkland.

The Planning Division also is involved in the promotion of district councils. The state was divided into 12 districts by the former Department of Planning and Economic Development in response to suggestions of federal agencies. The 1967 legislature provided for cooperative organizations among local governments with the Interlocal Cooperation Act (16-4901 to 16-4904). District boundaries were quite rigid but now may be changed upon petition by a local government.

District councils are not intended to be another layer of government. They are not responsible for the delivery of services nor do they exercise taxing authority. They are voluntary organizations concerned with policy planning, program development and coordination. A majority of the voting members of a certified council must be executive officers of local governments within the

district and must represent at least 75 percent of the district's population.

Once a district council is certified applications for certain federal moneys from governmental organizations within the district and all state agency plans for facilities and work programs which affect the district must be submitted to the council for review and comment. A council may attempt to resolve conflicts between proposals and the district's adopted comprehensive plan.

THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

The Board and the Department of Natural Resources and Conservation are charged with administering a large body of law, much of which directly and indirectly affects the use of land. Included within the scope of the department are oil, gas, water and forest resources, soil and grass conservation, and the review of energy conversion and transportation facilities.

The Board of Oil and Gas Conservation is attached to the Department of Natural Resources and Conservation for administrative purposes only; it has retained almost complete independence. The board regulates all facets of the drilling, production and plugging of oil, gas and associated wells. Its only direct charge with regard to land use is to cooperate with the Department of Natural Resources and Conservation in locating the owners of abandoned wells, sumps and seismographic shot holes which have not been reclaimed in compliance with the board's regulations. Perhaps the essential legislative policy regarding the Board of Oil and Gas Conservation can be inferred from its retention of independence throughout executive reorganization.

The Division of Forestry directly controls almost 490,000 acres of state-owned timber lands. With regard to these lands the division is under the jurisdiction of the Board of Land Commissioners and the Department of State Lands. The policies guiding the division are considered under the discussion of the Department of State Lands.

The division also is involved in a number of programs related to private lands, reduction of fire hazards, cooperation in forest management, and watershed protection. Fire protection on private lands is financed by private land owners through a forest fire protection tax assessment established by the legislature (28-109).

Soil and Grass

The soil and grass conservation programs and the rangeland resource program coordinated and administered by the Department of Natural Resources have substantial impacts on the use of land for agricultural purposes. The conservation district program, in particular, includes the potential for very significant impacts on land use outside of incorporated cities and towns.

The legislature has declared firm policies and purposes with respect to the conservation of soil and grass resources of the state. The State Conservation Districts Law, enacted in 1939 and amended in 1959, declares that it is state policy to:

> provide for the conservation of soil and soil resources of this state, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering the conservation, development, utilization, and disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect the tax base, protect public lands and protect and promote the health, safety, and general welfare of the people of this state (76-102).

Grass conservation districts may own land, purchase and market livestock and equipment and supplies needed by the livestock industry, and manage and control the use of district rangeland. Grazing rights are distributed to members and limited by the carrying capacity of the range. However, the legislature has directed that "a sufficient carrying capacity of range shall be reserved for the maintenance of a reasonable number of wild game animals, to use the range in common with livestock grazing in the district" (46-2332).

The department also promotes and supports the Montana Rangeland Resource

Program. The basic objectives of this program are articulated in a 10-year goal statement and include improved range, increased stockwater availability, increased recreational use and enhanced wildlife habitat.

Conservation districts are political subdivisions of the state governed by a board of conservation district supervisors. The legislature has stipulated in great detail the factors to be considered in the establishment of a district. Provision is made for attempting to consider the interest of all who might be included. Districts including one or more incorporated municipalities have two supervisors appointed by the governing bodies of the municipalities, the other supervisors (either five or seven) are elected within the district. Similarly, Sec. 11-3810 requires that county planning boards include at least one member of a board of conservation district supervisors in those counties where there are conservation districts.

The legislature has granted the districts extensive powers to study and regulate the use of land. Districts may prepare comprehensive plans for the conservation of soil and water, for flood protection, and for the development and disposal of water in the district. To carry out these plans, district supervisors have authority to prepare and adopt regulations which may mandate needed engineering operations, specify methods of cultivation and grazing, require retirement from cultivation of areas highly susceptible to erosion or areas where erosion cannot be adequately controlled if cultivation is carried on, and other provisions necessary to conserve soil and prevent erosion. In addition, supervisors may classify and regulate land within the district according to its agricultural characteristics (76-109).

Land use regulations proposed by the supervisors must be approved by the majority of electors within the district before they can be adopted. After adoption, the supervisors must provide for a board of adjustment to hear appeals rising from practical difficulties and hardships resulting from the regulations.

The regulations may be enforced through the courts.

No conservation district has adopted land use regulations. However, because the relationship between county regulations and district regulations has not been clarified by the legislature, if the two sets of regulations were to disagree conflicts would have to be decided in court.

In addition to the stated policy, the State Conservation Districts Law (cited above) includes an implicit policy of voluntary compliance. The legislature apparently concluded that the right of a person to misuse his land is superior to the public's right to prevent that misuse. Erosion is no longer the threat to the state's farm and grazing lands it once was, but blowing soil remains the state's chief air pollutant and sediment is the state's chief water pollutant. Soil that is blown or washed away is lost forever. The underlying conflict of rights, therefore, is substantial.

Water

Land use, like life itself, is intimately linked to the availability of water. However, the subject of water is complex. The legislature has addressed the subject of water in many different laws, but the policy declarations of the legislature have remained similar. The Montana Water Resources Act, as amended in 1974, declares, in part:

> 1) The general welfare of the people of Montana, in view of the state's population growth and expanding economy, requires that water resources of the state be put to optimum beneficial use and not wasted.
>
> 2) The public policy of the state is to promote the conservation, development and beneficial use of the state's water resources to secure maximum economic and social prosperity for its citizens.
>
> ...
>
> 5) The water resources of the state must be protected and conserved to assure adequate supplies for public recreational purposes and for the conservation of wildlife and aquatic life.
>
> ...
>
> 8) The greatest economic benefit to the people of Montana can be secured only by the sound co-ordination of development and utilization of water resources with the development and utilization of all other resources of the state (89-101.2).

The policy statement of the Montana Water Use Act, enacted in 1973, concurs:

> It is the policy of this state and a purpose of this act to encourage the wise use of the state's water resources by making them available for appropriation consistent with this act, and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems (89-866 (3)).

The legislature has provided organizational and administrative frameworks for the management of the water resource of the state and for the resolution of conflicts surrounding that resource. The statutes provide for irrigation districts, drainage districts, flood control and water conservation projects by counties, municipalities, and conservancy districts, and they implement a policy of developing the water resource. All such programs indirectly affect land use.

For example, conservancy districts may be established and incorporated for numerous purposes, including flood and erosion prevention and control; land drainage; promoting recreation; conserving water and related lands, forests, fish and wildlife; and agricultural, industrial and municipal uses. Districts are authorized to exercise broad powers relating to the use and distribution of the water controlled by the district (89-3401 to 89-3449).

The Department of Natural Resources and Conservation has been directed by the legislature through the Water Resources Act to prepare a comprehensive state water plan for the approval and adoption of the Board of Natural Resources and Conservation. The plan is to be based on the multiple-use concept and is to "set out a progressive program for the conservation, development and utilization of the state's water resources, [and] propose the most effective means by which these water resources may be applied for the benefit of the people, with due consideration of alternative uses and combinations of uses" (89-132.1). A draft of the first segment of this plan, done for the Flathead River Basin, will be available for public review and comment early in 1975.

Public hearings are required during adoption of the plan. As the plan is completed sections are to be submitted to the legislature, but the legislature

has not established the legal significance of the plan except to tie it to the general objectives of the Water Resources Act and to "protect the waters of Montana from diversion to other areas of the nation" (89-101.2).

The legislature also has charged the department with administering the law designating controlled groundwater areas and the regulation of withdrawals from them. The legislature recognized that in areas where groundwater withdrawals could be exceeding recharge, strong regulation is required. The Board of Natural Resources and Conservation is required to hold hearings, prepare written findings and issue an order which may set an annual withdrawal limit for an area. Allocation of the allowed withdrawal must abide by pertinent water rights. The same law charges the department with preventing the wasting of groundwaters, defined as applying groundwater to other than a beneficial use (89-2911 to 89-2936).

The 1972 Montana Constitution also addresses the topic of water. In response to Article IX, Sec. 3 of the Constitution, the 1973 legislature declared (through the Water Use Act) that any use of water is a public use, that all water in the state is state property for the use of its people, and that water may be appropriated and used only for beneficial uses. Sec. 89-867 defines "beneficial use" as:

> a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agriculture (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal power, and recreational uses; provided, however, that a use of water for slurry to export coal from Montana is not a beneficial use.

The legislature has directed the department to establish a centralized record system of existing rights and begin a process of adjudication, under the supervision of the district court, to determine those rights exactly. The legislature also has sustained the policy that between appropriators, "the first in time is the first in right" (89-891 and 89-896).

Significantly, and perhaps in recognition of its stated policies with regard

to wildlife and aquatic ecosystems, the legislature directed that the Department of Fish and Game may represent the public to establish any existing public water rights for recreational use under the act. However, the legislature specifically declared that it was not making a legislative determination of whether recreational uses established prior to the effective date of the law (July 1, 1973) are beneficial uses (89-872).

From the date the Water Use Act became effective all water appropriations and changes in purpose or place of use require a permit from the department, except in the case of a well outside a controlled groundwater area with a maximum yield of less than 100 gallons per minute. The legislature has declared that a permit must be issued if:

(1) there are unappropriated waters in the source of supply;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved (89-885).

Clearly the act establishes a rational process for appropriation and "wise utilization, development, and conservation" of water. However, the last part of the act's policy statement, that water should be appropriated with the "least possible degredation of the natural aquatic ecosystems," appears to have been forgotten in the procedures formulated for reviewing permit applications.

Regulating water use and appropriation indirectly influences the use of land; in addition, the 1971 legislature charged the department with directly regulating the use of lands in the floodplains of rivers. The legislature has recognized "the right and need of watercourses to periodically carry more than the normal flow of water" had has provided the department with the necessary authority to carry out a comprehensive floodway management program for the state (89-3502).

The department has been directed to delineate the 100-year floodplain on all streams and rivers in Montana. (The 100-year floodplain is that area likely to be flooded on the average of once every 100 years. In other words, the 100-year floodplain has a 1 percent chance of being flooded in any given year.) The local government having jurisdiction and the affected people must be afforded opportunities for input to the floodplain delineation process.

Local governments having jurisdiction over designated floodplains have six months from the state's notification of floodplain designation to adopt land use regulations for the area designated. The regulations must at least meet the minimum floodplain regulations adopted by the Board of Natural Resources and Conservation. If a local government fails to comply, or adopts regulations failing to meet the minimum standards, the department must enforce the minimum standards within the designated floodplain (89-3504).

The legislature has prohibited certain land uses in the floodplain and allowed others. Some uses require a permit. Permits are issued by the local government having jurisdiction over the floodplain if the local government has adopted adequate regulations; otherwise permits are issued by the department. The department retains the right to suspend the permit power of a local government if it fails to enforce its own regulations. Sec. 89-3507 outlines criteria for the review of permits and emphasizes that danger to life and property is the primary consideration.

As declared in the policy and purposes of the act, the legislature has attempted to "balance the greatest public good with the least private injury" (89-3502). To this end the legislature has defined a two-zone floodplain with more stringent regulations required for an inner area or floodway, where the danger is greatest, and less stringent regulations required for the outer floodplain.

The legislature, through the Montana Utility Siting Act of 1973, charged the department with direct regulation of a very broadly defined land use: energy generating and conversion plants and their associated facilities. Included are transmission lines, dams, aqueducts, transportation links and certain pipelines. The legislature paraphrased the environmental declaration of Article IX, Sec. 1 of the 1972 Montana Constitution (quoted below) and further decreed that "no power or energy conversion facility shall hereafter be constructed or operated within this state without a certificate of environmental compatibility and public need" issued by the Board of Natural Resources and Conservation (70-802).

The legislature has emphasized the all-encompassing intent of this section by the scope of the act's definition section (70-803) and the long list of information required in the evaluation of an application for a public need certificate. The act orders other state agencies to cooperate with the Department of Natural Resources and Conservation to compile information on the impact of the proposed facility (70-807).

The legislature has declared that the board must issue decisions in writing accompanied by complete findings including: the basis of the need for the facility; assurances that the facility will have the minimum adverse environmental impact given available technology and economic realities; that the facility will not violate state and federal air and water quality standards; and that the facility conforms to applicable state and local laws except when the board finds local laws excessively restrictive in view of existing technology, economics, or the needs of consumers (70-810).

A policy of maximizing the opportunity for public involvement in the certification process can be inferred from the list of groups made parties to the certification proceedings and granted the right to seek judicial review of decisions of the board. Parties to the proceedings include the applicant, the department, local governments affected or potentially affected by the board's

decision, and any interested person or group of persons (70-808).

In addition, all utilities are required to maintain an annual plan covering projected demand and construction for the following 10 years. This plan is to be filed with several state agencies and is publicly available (70-814).

Precedents

In the body of law administered by the Board and Department of Natural Resources and Conservation, the legislature has established two significant precedents. The floodway management and regulation act (89-3501 to 89-3515) establishes that there are areas of the state where there exists, due to the characteristics of the area, an overriding state interest in the regulation of the use of land. The Utility Siting Act (70-801 to 70-823) establishes that there exist types of development, that is, land uses, with such widespread effects that they cannot be reasonably regulated by local government.

THE DEPARTMENT OF STATE LANDS

Approximately 5.25 million acres of state-owned land (just over 5 percent of the state) are under the direct control of the state Board of Land Commissioners. In addition, the commissioners exercise permit power over certain land uses on all non-Indian trust lands within the state.

State-owned lands were granted to Montana by the federal enabling act of 1889 which provided for Montana's statehood (25 U.S. Statutes at Large 676, as amended). Sections 16 and 36 in every township across the state were given to the state for the support of common schools and additional lands were given for the support of other educational institutions. Where these sections or any part of them were no longer available to the federal government for granting to the state, the state was allowed to select comparable land from the public domain.

The enabling act also directed the state to establish permanent funds from the proceeds of the sale of timber, oil and other minerals found within the

granted lands, and from the sale of the lands themselves. The interest from these funds and rentals received from land leases, interest payments on land sold, and all other actual income is made available for the maintenance and support of school systems throughout the state.

The Board of Land Commissioners was created by the 1899 Constitution and was recreated by Article X, Sec. 4 of the 1972 Constitution. The board consists of the governor, the superintendent of public instruction, the state auditor, the secretary of state and the attorney general. The Department of State Lands acts under the direction of the board, administers the laws charged to the board, and manages most state-owned land. However, state forest lands are managed cooperatively by the Department of Natural Resources and Conservation and the board.

The 1927 legislature declared for the board and department what is now becoming a somewhat troublesome mandate:

> the guiding rule and principle [of the Board] is that these lands and funds are held in trust for the support of education, and for the attainment of other worthy objects helpful to the well-being of the people of this state; and the board shall administer this trust to secure the largest measure of legitimate and reasonable advantage to the state (81-103).

To this basic policy mandate the 1969 legislature added the direction to manage the lands under the multiple-use management concept, a concept defined briefly as harmonious and coordinated use of the various resources of the land without impairment of the land's productivity and with "consideration being given to the relative values of the various resources" (81-103).

The 1967 legislature enacted a law declaring as state policy that:

> It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, the university system and other institutions benefiting therefrom and that in so doing the economy of the local community...is benefited (81-2401).

This act allows up to 2.5 percent of specified income from state-owned lands to be used to develop or conserve state land resources including surface and underground water (81-2401 to 81-2408).

Most of the state's land (about four-fifths) is leased for grazing or agricultural use. The policy that can be inferred from the laws regulating leasing for agricultural use is one of maintaining the long-term productivity of the land and a long-term return to the school trust funds. Leases may be cancelled for mismanagement: overgrazing, allowing excessive wind or soil erosion, permitting an abundance of noxious weeds, or inefficiently using the productive capability of the land (81-422). The legislature has also expressed a concern for the rights of the leaseholder and provided a process to compensate him or her for improvements made to the land if the lease changes hands (81-421).

State lands also may be leased for other uses, primarily the extraction of oil and gas, and the mining of coal, metals, and non-metaliferous minerals.

Coal leases may be issued on lands under lease for grazing or agriculture or on lands which have been sold but in which coal rights have been reserved by the state. In either case the board is directed to exercise care to protect the rights of the lessee or purchaser (81-501). (However, this "care" has tended to be interpreted as compensation for damages.) In addition, the legislature has directed that coal mining on state lands must not be wasteful or make future mining operations more difficult or expensive (81-501).

The law provides that leases for the mining of metaliferous minerals or gems, for the mining of non-metaliferous minerals and for the extraction of oil or gas must provide for protection of the rights of any affected agricultural or grazing lessee (81-608, 81-703, 81-1701). However, the legislature has resolved explicitly only conflicts among those wishing to mine metaliferous minerals or gems and those wishing to extract coal, oil or gas. Where coal, oil, or gas leases are in effect, permission of the coal, oil or gas lessee is required before a mineral lease can

be issued on the same land (81-610). No legislative guidelines have been provided to resolve conflicts when agricultural or grazing leases come into direct conflict with coal, gas, oil, or mineral leases.

The legislature has expressed a policy of conservation with regard to oil and gas leases on state lands. Although Sec. 81-1711 does not directly mandate so-called unit operation, it is strongly encouraged to insure that the maximum quantity of oil or gas is extracted from each reservoir.

Land likely to contain valuable deposits of coal, oil, oil shale, phosphate, metals, sodium or other valuable minerals is not subject to sale (81-901). This furthers the policy of insuring best possible return to the state; the worth of a mineral deposit is not likely to be known fully until after its extraction. Also to further the policy of maintaining a long-term return to the school trust fund, the legislature has prohibited the sale of timberland (81-901) and has authorized measures to achieve sustained production on state lands.

Interestingly, the legislature has declared a policy to avoid selling state lands to speculators

> As far as possible to determine the lands shall be sold only to actual settlers or to persons who will improve the same, and not to persons who are likely to hold such lands for speculative purposes intending to resell the same at a higher price without having added anything to their value (81-908).

In addition, the Montana Natural Areas Act of 1974 provides for the protection of areas with "significant scenic, educational, scientific, biological, and/or geological values," and which appear to have been affected primarily by natural forces (81-2702). These "natural areas" may be designated on state-owned land by the Board of Land Commissioners or by the legislature. The board may acquire qualifying private land as a natural area by any legal means, but may exercise the power of eminent domain only in specific instances authorized by the legislature (81-2707).

Reclamation

The Montana Constitution directs the legislature to provide effective requirements and standards for the reclamation of lands disturbed by the removal of natural resources: "All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed" (Article IX, Sec. 2, Montana Constitution). The legislature has charged the Board of Land Commissioners with the implementation of state policy in this area.

There are four laws which state, in varying forms, the state's policy with regard to mining and reclamation: The Strip Mine Siting Act (1974); The Montana Strip Mining and Reclamation Act (1973); Open Cut Mining Act (1973); and the 1971 act providing for the reclamation of mining lands, usually referred to as the hard rock mining act.

Perhaps the one policy statement which best condenses and expresses in simple terms the thrust of all four is that of the Open Cut Mining Act:

> It is the policy of this state to provide for the reclamation and conservation of land subjected to...mining. Therefore, it is the purpose of this act to preserve natural resources, to aid in the protection of wildlife and aquatic resources, to safeguard and reclaim through effective means and methods all agricultural, recreational, home and industrial sites subjected to or which may be affected by...mining to protect and perpetuate the taxable value of property, to protect scenic, scientific, historic or other unique areas, and to promote the health, safety, and general welfare of the people of this state (50-1502)

To this, the 1973 legislature added, through the Strip Mined Coal Conservation Act, a policy prohibiting the waste of strip mined coal: "it is declared to be the public policy in providing for the orderly development of coal resources through strip mining to assure the wise use and to prevent the waste of coal" (50-1402).

The Montana Strip Mining and Reclamation Act (50-1034 to 50-1057) has been touted as the nation's most stringent and comprehensive law regulating mining and reclamation. Any person removing or intending to remove by strip mining more than

10,000 cubic yards of coal, uranium and/or overburden must obtain a permit from the Department of State Lands. Permits are issued for a period of one year and must be renewed annually. An application for a permit must include a plan for the mining operation and for the reclamation, revegetation, and rehabilitation of the land and water affected by the mine. The law requires a detailed pre-mining inventory of the natural and man-made characteristics of the mining area including vegetation, wildlife, soils, overburden, surface and ground water hydrology, ownership patterns, location of all water, oil, and gas wells, roads and utility lines. During the operation of the mine continued water quality, soil and overburden sampling is required.

Area strip mining, a method of operation which does not produce a bench or fill bench, is required. Furthermore, the mined area must be restored to approximately its original contours and topsoil must be conserved. To insure that the provisions of the permit are carried out, a bond must be filed with the department for an amount determined by the board based on the characteristics of the area to be mined. The bond may be neither less than $200 nor more than $2,500 for each acre or portion of an acre to be mined, provided that the bond equals the estimated amount that would be required for the state to complete the work described in the reclamation plan. Return of the bond is contingent on the mine operator's faithful performance in meeting the act's requirements. In no case can a bond be released sooner than five years after revegetation.

In addition to forfeiture of bonds, the department may enforce the law through the suspension of existing permits and, in the case of a mine operator who has more than one permit, the denial of permission to mine lands under the other permits. Civil and criminal penalties are provided for in the act, and the right to seek mandamus in district court to compel state officials to perform their duty under the act is granted to all residents of the state. The act regulates prospecting in much the same manner.

The Strip Mine Siting Act (50-1601 to 50-1617) also applies to coal and uranium mining but extends the review of the department to mine location and site preparation. Site preparation includes the construction of roads, railroad spurs, transmission lines, draglines, and train load-out facilities. The authority granted under the act prevents a situation in which a mine operator would spend a large sum of money on site preparation and then go to the department for a strip mining permit. Obviously, it would be extremely difficult for the board objectively to consider a permit application after a firm invested millions of dollars in site preparation.

The Open Cut Mining Act (50-1501 to 50-1516) applies to any mine operator intending to remove by surface mining 10,000 or more cubic yards of bentonite, clay, scoria, phosphate rock, sand or gravel. The act contains provisions and stipulations similar to those of the Strip Mining and Reclamation Act including the requirement that bond of $200 to $1000 per acre be filed with the department. Instead of a permit system, the law requires mine operators to enter into a contract with the state providing for the reclamation of mined land. The contract may be enforced by the department through forfeiture of bond and criminal penalties.

The hard rock mining act (50-1201 to 50-1226) applies to the mining of all minerals not covered by the Strip Mining and Reclamation Act and the Open Cut Mining Act. Permits are required from the department for exploration, development, and mining if the proposed operation will remove at least 100 tons, in the aggretate, in any 24-hour period. Miners removing less than 100 tons a day must submit a mining plan and obtain a "small miners exclusion" statement from the department. Hard rock mining act regulations are based on potential uses of the land; difficulties of grading and revegetation; procedures needed to control drainage and stream pollution; and the protection of human life, and property, wildlife and vegetation. The law requires that a bond be filed with the department for not less than $200 nor more than $2500 per acre or fraction of acre mined. However, the total bond

must be sufficient to cover the estimated costs to the state of completing the reclamation of the mined lands. In addition to forfeiture of bond, the act provides for civil penalties for violation of the provisions of the act.

The Board of Land Commissioners was assured of eventual policy contradictions by the laws establishing the trust lands and creating the basic management concepts for them. Inevitably, interests groups promote differing uses for public lands; the legislature has brought the situation to a head by assigning additional duties to the department and board without resolving long standing questions surrounding the use of state-owned lands.

Generally, past commissioners have interpreted the law to mean that the school trusts must be compensated for each use of trust lands, and that uses offering the greatest long-term compensation are preferred. It has been argued, on the other hand, that the legislature has declared that trust lands are not solely for the support of education and may be used for "other worthy objects helpful to the well-being of the people of this state" (81-103). The legislature may have exceeded its authority by including "other worthy objects" in its directions to the board. The federal act granting the trust lands to Montana mentions only the support of common schools (25 U.S. Statutes At Large 676, as amended). In any event, the application of the law has not always been consistent.

It is often argued that state lands are not now leased to bring the highest return to the state. The 1973-74 fiscal year income from the leasing of state land was approximately $13.5 million. Averaged over the approximately 5 million acres of state lands, the total reduces to about $2.75 per acre. Significantly contributing to this low per-acre income are the relatively low grazing rentals established by the legislature (81-433). (36)

State forest lands now are open to the public for recreation (grazing and agricultural lands are not) without additional compensation to the trust; such activity tends to lessen the value of the land for simultaneous grazing leases.

Access for public recreation is, in fact, one of the big issues surrounding the leasing of state land for grazing and other agricultural purposes. There is a clear policy conflict in this area that is resolved currently by administrative discretion.

Other areas of conflict include the policies indicated in the Montana Natural Areas Act of 1974 (81-2701 to 81-2713); the State Antiquities Act (81-2501 to 81-2514); and the classification and reclassification of state lands directed by House Bill 22, enacted by the 1974 session (81-302). Which takes precedence, the enabling act, the general mandate to the board, or subsequent legislation? The legislature has not spoken to this issue.

When reviewing applications for prospecting or mining permits, statutory considerations of the board are limited to the feasibility of and procedures for reclamation (50-1208). Strip mine permits are reviewed on a broader basis which includes consideration of "special, exceptional, critical, or unique characteristics" of the land to be mined, and to some extent, of adjacent lands (50-1042). However the social, environmental and economic impacts on the greater surrounding area, the county, the region, and the state, for that matter, need not be considered. The laws do allow for hearings, but currently there are no required procedures except those of the Montana Administrative Procedure Act. There is no mechanism to obtain input from the local people or their governments or from citizens generally, except through environmental impact statement review process.

When reviewing applications for strip mining coal on state-owned lands, the board finds itself in a particularly conflicting position. Sec. 9 of the Strip Mining and Reclamation Act (50-1042) directs the board to deny a permit if the land to be mined possesses "special, exceptional, critical, or unique characteristics." Yet to comply would violate the legislature's declaration that state lands be managed for maximum long-term return to the school trust fund. The board might argue that to mine the land now, reclaim and return it to grazing or agriculture would produce the maximum long-term proceeds. However, this argument

does not avoid violating the directions of Sec. 9. The situation is made even more untenable by the board having invoked Sec. 9 to deny permits for strip mining on private lands.

A deceivingly simple solution to this dilemma would be the transfer of the administration of mining laws to another state department. But the legislature still would need to state which policies, those of the general mandate given the board, or those regarding mining, should take precedence on state land. The declaration in the Montana Constitution regarding reclamation might be useful in resolving this conflict.

THE DEPARTMENT OF REVENUE

With few exceptions, the legislature has not acknowledged the relationship between taxation and the use of land, let alone set conscious policies in this area. The basis of the property tax structure in Montana has been set in a clear legislative directive: "All taxable property must be assessed at its full cash value except the assessment of agricultural lands shall be based upon the productive capacity of the lands when valued for agricultural purposes" (84-401). However, the directive has not been implemented as stated. The assessment of land and land improvements in general (excepting agricultural lands) has been administratively set at 40 percent of market value; that is, "full cash value" is now defined as 40 percent of market value.

The legislature also has divided all property into nine classes and has stipulated the percentage of the assessed value to be taken as taxable value. The taxable value multiplied by the mill levy equals the taxes owed. All land and improvements on land, with the exception of certain industrial property less than three years old, has been placed in the same class.

The legislature has declared that owners of new industrial property are to be given a tax break during the first three years' use of the property. During

this period eligible industrial property is taxed at 7 percent of assessed value as opposed to 30 percent (84-301). It is debatable to what extent this tax break, even when associated with other economic incentives available to the state such as mortgage guarantees and assistance, actually affects the decision of an industry to locate in Montana. Other variables such as distance to markets, transportation links, labor and raw material appear to be of much greater significance. However, the tax break does indicate a policy.

Railroad and public utility properties are also taxed somewhat differently than most land and improvements on land. Historically, the assessed value of railroad property has been determined by consideration of such factors as original cost, depreciation, and net earnings. The assessed value of utility property is based on similar factors, but appears to be more heavily influenced by original cost data (37).

Although agricultural land is classed with all other land it is assessed somewhat differently. The legislature has declared a tax policy which gives preferential treatment to agricultural land. In recognition of the large fluctuations in the value of agricultural products, the assessed value per acre of agricultural land has been linked to its productive capacity. This productive capacity is converted to dollars using the 1963 market prices of agricultural products. In 1963 this resulted in an assessed value of 20 percent of market value (15). Figures for 1973-74 indicate that assessed value of agricultural land is between 2 and 16 percent of current market value (38).

The taxation of agricultural land is the one area where the legislature has acknowledged a relationship between taxation and land use. In what is popularly known as the "greenbelt bill" the legislature stated:

> Since the market value of many farm properties is based upon speculative purchases which do not reflect the productive capability of farms, it is the legislative intent that bona fide farm properties shall be classified and assessed at a value that is exclusive of values attributed to urban influences or speculative purposes (84-437.1).

The law provides that land meeting specified criteria may be taxed only on its value for agriculture regardless of its market value. If land taxed under the provision of the law is taken from agricultural use the landowner is penalized by the difference between what he paid in taxes and what he would have paid without the greenbelt bill during the previous four years.

The policy embodied in this law is the protection of agricultural land from unsupportable tax burdens that would result in the sale of the land for suburban uses. Whether the law accomplishes this purpose, or merely provides a tax shelter for speculators, depends on the criteria used to define agricultural land. Unfortunately, the Montana greenbelt law may not be accomplishing the intended purpose. This will be discussed later in the study.

The inclusion of timberlands in the same class as all other lands also has significant policy implications. The market value of timberland is a function of both the market value of its standing timber and the market value of the land. A high tax on standing timber has been interpreted as an incentive to log and a disincentive to the practice of good forestry management by landowners who choose not to harvest. (The higher the quality of one's timber, the higher one's taxes.)

Lacking motivation and time to keep up with continually inflating market values, locally elected assessors tended to under-assess many types of property, particularly property lying outside city boundaries (38). In addition, local assessors may have been responding to political pressures for assessments lower than those that would have been made otherwise.

Under-assessment of vacant lots and of all land with respect to buildings and improvements also contributes to the speculative holding of vacant land in cities, and in conjunction with lower rural taxes, to suburban sprawl. Under-assessing expensive property with respect to other land contributes to the spatial separation of the wealthy from others.

The 1973 legislature moved to strike inequities in the state's assessment

procedures by making county assessors agents of the state Department of Revenue and providing for statewide record keeping and unified direction of assessment activities (84-402). The legislature was not motivated by land use considerations, however, but by considerations of equity in taxation.

Assessment is only the first step in determining taxes. The mill levy is the final step. Mills may be levied by state, county, city and town governments, and school and special districts.

School district levies in particular contribute to differences in property taxes among counties and between urban and rural areas. Urban areas and more urbanized counties have consistently higher school levies even though the 1972 legislature corrected this difference somewhat by shifting the funding of certain deficiencies in school appropriations from county and school district to statewide levies.

However, Montana's basic policy commitment to the financing of local government through local property taxes insures continued and substantial tax rate differences among counties and between urban and rural areas. In Montana, 96 percent of local government tax revenues, and 62 percent of all local government revenues are from property taxes. Both figures are significantly above the national average. In most states property taxes are used for financing capital improvements; here, property taxes provide the operating revenues of local government (39).

Relying on property taxes for operating revenues increases the difficulties faced by local government in providing public facilities, preserving open space, and making capital improvements. Local government is forced to seek land uses that pay high property taxes and discourage all others. In addition, the system tends to keep poor local governments poor and make wealthy local governments wealthier.

Local governments that cannot afford public facilities or capital improvements are less attrative to development yielding high property tax revenues.

But without such developments local governments dependent on the property tax for civic improvements will never be able to afford them.

There is one area, however, where the legislature has instituted a tax to remedy the undesirable effects of a land use. Stating that "It is the policy of this state to provide against loss or damage to our environment from the extraction of nonrenewable natural resources" (84-7002), the legislature provided for a resource indemnity trust funded by a tax on the extraction of mineral resources. Revenue from the fund is to be used to improve Montana's environment and correct past damages.

With the exception of the assessment of agricultural land, then, the legislature has not recognized the land use effects of taxation. Nor has it established policies in this area. The effects, however, occur with or without the recognition of the legislature. The last section of this study discusses the use of taxation to guide future land use decidions.

THE MONTANA ENVIRONMENTAL POLICY ACT

To the laws administered by the executive agencies, the 1971 legislature, through the Montana Environmental Policy Act (MEPA), declared a state policy on the environment intended to supplement all other policies. The environmental policy states: "it is the continuing policy of the state of Montana...to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans" (69-6503).

The significance of this legislative action should not be underestimated. The Montana Environmental Policy Act (69-6501 to 69-6517) is a rare example of an effort by the legislature to establish and fund an agency to insure the implementation of a single coherent policy. MEPA establishes a process to review all state agency decisions that may significantly affect the quality of the human

environment and provides for a legislative agency, the Environmental Quality Council (EQC), to oversee the process. The EQC reports to the legislature and governor on state actions and programs contributing to or interfering with the environmental policy.

What has not been resolved, either by the legislature or the courts, is the degree to which state agencies acting under other state policies are bound by the environmental policy. The legislature through MEPA declared a sweeping state policy but generally has provided neither specific guidance for its implementation, nor a system for resolving conflicts between MEPA and other state policies. In the absence of commanding legislative direction, conflict resolution is left, by default, to administrative discretion, and, perhaps the courts.

HOW IT ADDS UP

Abstracting and consolidating the various policy statements identified in the state agency review can reveal the existing, but implicit overall land use policy of the state. Nowhere is this policy stated in full, and it is unlikely that anyone would suggest it be adopted as a consolidated policy the way it stands. This implicit statement, however, makes it state policy to:

1. Protect and preserve fish and wildlife resources and provide Montanans with adequate hunting and fishing opportunities for all time.

2. Protect areas primarily affected by natural forces and areas of historic, archeological or paleontological significance.

3. Conserve the scenic and recreational resources of the state and provide for their use and enjoyment.

4. Conserve the grass and soil resources of the state on a voluntary basis.

5. Secure maximum economic social benefits of water use with as little degradation as practicable, while preserving fish and wildlife, avoiding waste, and providing adequate supplies for all uses.

6. Balance all values affected by air pollution control while protecting public health and preventing injury to plant and animal life and property.

7. Provide an integrated system of highways but limit the discretion of highway officials with few statutory guidelines, limit them primarily by the availability of federal and state funds.

8. Promote the development of airports.

9. Use state lands to provide maximum return to the school trust fund except to protect natural areas and antiquities, provide some recreation, but fail to protect surrounding land use values.

10. Reclaim mined land and prevent the waste of coal.

11. Diversify and expand the economic base of the state, create new uses for agricultural products, and accelerate the development of natural resources.

12. Consider land use effects of taxation only with respect to agriculture.

13. Create and maintain a productive and harmonious relationship between man and nature while implementing the first 12 policies.

By its breadth, such a policy statement offers little guidance to state officials. Encompassing a great many interests and values, the statement fails to acknowledge that it is not possible to simultaneously promote all interests and protect all values. Tradeoffs must and will be made in administering the law. Although recent legislatures have moved to reduce administrative discretion in making required tradeoffs, existing statutes do not adequately resolve the conflicts among the values and interests that are involved in decisions affecting the use of land. In the absence of a commanding overall policy, state officials almost always will rely on the single policy expressed in the particular law they are administering.

Moreover, the legislature does not always include in a law adequate provisions to accomplish the goals of the law's policy statement. Lacking provisions implementing the articulated policy, state officials are most likely to carry out whatever policy is implicit in the procedures provided.

For example, officials of the Department of Natural Resources and Conservation acknowledge in the final environmental impact statement, Prickly Pear Creek Water Diversion Proposal (Department of Natural Resources and Conservation, August, 1974), that provisions of the Montana Environmental Policy Act and of the water quality act might be relevant to the diversion decision at hand. In particular, the latter act declares a public policy to "conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses" (69-4801, emphasis added).

Likewise, the policy statement of the Montana Water Use Act, the law under which the decision was being made, declares that "It is the policy of this state and a purpose of this act... to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems" (89-866, emphasis added).

Yet in reaching their decision, the officials of the department felt they were restricted to the five specific criteria laid out in the act:

(1) there are unappropriated waters in the source of supply;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion or construction are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved (89-885).

Protection of natural aquatic ecosystems or of wildlife and provisions for recreation are not included in these criteria. In fact, officials of the department argue that they would be obligated to grant a water use permit in response to an application satisfying the criteria even if it would result in the "dewatering of the stream" (p. 38, Prickly Pear Creek Water Diversion Proposal).

When the legislature does not stipulate the policy that will prevail in conflicts among state policies then the formulation of governing policy is left to administrative agencies. Conflicts will be resolved through the most convenient interpretation of agency mandates or through bureaucratic infighting. Too often the policy favored by the agency with access to federal funding will be the policy followed.

Montana's existing land use policy is a composite of many policy statements: many complementary, a few contradictory. But the lack of legislative recognition of the interactions of the policy statements leaves the determination of the direction provided by state policy to state administrators.

Local Government Review

In Montana the overwhelming majority of decisions concerning land use are made and carried out without the direct involvement of state government. A great many such decisions do, however, involve local government. Montana's 126 incorporated cities and towns and 56 counties exercise both direct and indirect influence over the use of land. They could, at least theoretically, exercise direct regulatory review over almost every land use decision if they chose to do so.

The legislature has delegated extensive land use control authority to local government, but the body of law containing this authorization is cumbersome and occasionally confusing, particularly with regard to county government.

Montana's old Constitution made a distinction between counties and incorporated cities and towns that was construed to mean that counties could not exercise legislative power while cities and towns could. The 1972 Constitution narrows the difference and declares that counties as well as incorporated cities and towns may exercise legislative and administrative power. Viewing the provisions in the old Constitution, the confusion in the laws, and a Montana Supreme Court decision striking down as unconstitutional the zoning powers granted to counties in 1957,

counties have been very reluctant to exercise any direct land use control.

The 1972 Constitution also directs the legislature to provide for review of existing local government forms and for an election to allow choice of alternative forms of city, county and city-county government. The 1974 legislature created a state Commission on Local Government to carry out the local government review at the state level and provided for local government study commissions to carry out the review at the local level. Elections on alternative local government forms are set for 1976. This extensive review of local government could alter significantly the role of local government in land use decisions; meanwhile, local governments operate under a body of law that has accumulated over the last 45 years.

ZONING

The 1929 legislature authorized incorporated cities and towns to regulate the use of land through zoning. Zoning regulations must be prepared in accordance with a comprehensive plan and designed to:

> lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements (11-2703).

Cities of the first class (classes of cities are based on population) may extend their zoning authority three miles beyond their boundaries; cities of the second class may do so for two miles and cities and towns of the third class may extend zoning for a mile. City zoning may be extended only if the area over which the zoning authority is to be extended has not been zoned by the county under the broader of the two county zoning authorities (Title 16, Chapter 47, to be discussed below). To exercise this authority a city-county planning board must be formed for the area to be zoned, or the city planning board must be increased to include two representatives from the area.

A safeguard is provided in the authorization of zoning through the provisions for a board of adjustment to act on requests for special exceptions from the zoning ordinance. A counterbalancing safeguard requires a three-fourths vote of the members of the city or town governing body to change the zoning ordinance if 20 percent of the property owners affected by a proposed change sign petitions of protest (11-2705).

Counties have been granted the authority to zone under Secs. 16-4101 to 16-4107 and Secs. 16-4701 to 16-4711. The first of these grants of authority, known as the rural zoning law or the 40-acre law, allows county commissioners to zone districts of at least 40 acres in size when they are petitioned to do so by at least 60 percent of the landowners in the district. However, commissioners may not create this type of zoning district in an area which has been zoned by a city under its powers to extend zoning authority outside city boundaries (16-4101).

Whenever a zoning district is created, the county's commissioners, surveyor and assessor must sit as a planning and zoning commission. The commission must prepare and adopt a development pattern for the physical and economic development of the district. The commission may prepare zoning regulations to enforce the pattern and the regulations may be adopted officially by the county commissioners. However, a district may not regulate land used for grazing, horticulture, agriculture, or the growing of timber (16-4102).

The second grant of zoning powers allows county and city-county planning boards to recommend, for consideration by county commissioners, zoning regulations for areas with adopted comprehensive plans. In addition to conforming to the comprehensive plan county zoning regulations must be designed to accomplish the same ends as city zoning ordinances as laid out in Sec. 11-2703 (cited above). Moreover, county zoning regulations may not prevent "the complete use, development or recovery of any mineral, forest, or agricultural resource" (16-4710).

The legislature has provided substantial safeguards in the procedures for adopting county zoning regulations. If 40 percent of the landowners within a

proposed zoning district submit written protest against establishment of the district or the adoption of the regulations, the county commissioners may not act and another zoning resolution may not be proposed for that district for at least a year (16-4705). When zoning regulations are adopted the county commissioners must provide for a board of adjustment to act on requests for special exemptions from the zoning regulations.

The 1971 legislature expanded the county's zoning authority by allowing adoption, as an emergency measure, of a temporary interim zoning map or regulation to "classify and regulate uses and relate matters as constitutes the emergency" (16-4711). The emergency action automatically expires a year after adoption, but the county commissioners may extend the regulation for an additional year (16-4711).

An earlier effort to grant zoning power to county commissioners was found unconstitutional by the Montana Supreme Court in 1961 (Plath v. Hi-Ball Contractors, Inc., 139 Mont 263, 362 P.2d 1021). The Court found that the legislature had lodged excessive discretion in planning boards and had unconstitutionally granted legislative power to county commissioners.

Cities, towns and counties also are authorized to zone around airports to eliminate or prevent dangerous obstructions. The statutes granting this authority are discussed as part of the state agency review under the Department of Intergovernmental Relations heading earlier in this study.

PLANNING BOARDS

The legislature has authorized counties and incorporated cities and towns to create planning boards. Planning boards are strictly advisory. A planning board may be created by an incorporated city or town, or by a county or by any combination or group of these local governments. However, a city or town wishing to establish a planning board must notify and allow the county commissioners opportunity to

create a city-county planning board instead. The jurisdiction of a city-county planning board normally extends 4½ miles beyond the boundaries of the city or cities represented on the board. The jurisdiction may be extended by petition of 5 percent of the landowners in the area to be included, provided that a majority of the resident landowners in the area do not sign protests against the proposed extension. County commissioners may not establish a county planning board if a majority of county voters (residing outside of cities or towns or the jurisdiction of existing city-county planning boards) disapprove in writing.

Planning boards must prepare and propose to the appropriate local governing bodies master plans for their jurisdictional areas. Master plans may include:

1. Surveys and studies of existing conditions and probable future growth.

2. Maps, charts and descriptive material presenting the existing natural and man-made characteristics of the area.

3. Recommendations and plans for development, redevelopment and improvement of the area.

4. Long-range development plans for public works projects. The local governing bodies may adopt the master plan. If they do, they must use it as a guide and consider it in their decisions regarding public facilities and structures, zoning, and subdivision regulations (11-3840).

SUBDIVISION REGULATION

The Montana Subdivision and Platting Act directs counties and incorporated cities and towns to regulate land subdivision under statutory standards. The act is discussed in the state agency review under the Department of Intergovernmental Relations heading earlier in this study.

At one time counties held substantial acreage. To cooperate with county commissioners in administering county land the 1933 legislature created a County Land Advisory Board in each county and gave the boards purpose by declaring a firm policy:

> To promote the conservation of the natural resources of the state; to provide for the conservation, protection and development of forage plants, and for the beneficial utilization thereof for grazing by livestock under such regulations as may be considered necessary; to put into crop production only such lands as are properly fitted therefor; to encourage the storage and conservation of water for livestock and irrigation; to place the farming and livestock industries upon a permanent and solid foundation;...to gradually restore to private ownership the immense areas of lands, which have passed into county ownership because of tax delinquencies (16-1505).

Cities directly control the use of land or influence land use decisions through the power of eminent domain (11-977); the power to organize special improvement districts for construction, improvement and maintenance of streets, malls, parking facilities, drainage and flood control works, lighting districts and other projects (11-2201 to 11-2288); and the powers granted to accomplish urban renewal (11-3901 to 11-3925).

Counties influence land use decisions through the powers to establish rural improvement districts (16-1601 to 16-1638); metropolitan sewer districts (16-4401 to 16-4418); and county water and sewer districts (16-4501 to 16-4535). These three chapters of law contain careful procedures for the establishment of such districts and for effective protest by citizens affected by county actions.

County commissioners also have responsibility for locating county roads and for recommending routings of secondary highways (32-2801 to 32-2820). They also may establish a park commission to acquire, establish and maintain parks, playgrounds, swimming pools, golf courses, libraries and other projects (16-4801 to 16-4807).

The Planned Community Development Act of 1974 revamped the procedure used by

cities and towns to expand through annexation and declared a state policy that "Areas annexed to municipalities...should receive the services provided by the annexing municipality as soon as possible following annexation" (11-515). This legislation was enacted to curtail annexation merely to increase the tax base yet allow annexation of unincorporated areas benefiting from city services.

Each municipality and county also may influence land use decisions by acquiring land, buildings, and other improvements for an industrial project through the issuance of bonds that impose a limited obligation on those local government bodies. Project financed by these bonds may be sold or leased as the governing body sees fit but may not be operated by either the municipality or county. The law stipulates that any such project must be "suitable for use for commercial, manufacturing or industrial enterprises, recreation or tourist facilities, and hospitals, long-term care facilities or medical facilities" (11-4402, 11-4401). The law does not stipulate any criteria for selection of projects or require that they conform to a land use plan for the area (11-4102).

The legislature also has directed that cities, towns, counties, municipalities and the state may acquire land for permanent open space. The Open-Space Land Act, enacted by the 1969 legislature, authorizes jurisdictions to acquire land for permanent open space or to designate as open space land already controlled. Open space designations must conform to urban area comprehensive plans (62-604).

Land designated as permanent open space may not be used for other purposes unless equivalent land is designated permanent open space in its stead. In addition, the taxes on open space land in which there is less than full public ownership must reflect the change in market value resulting from the public interest (62-605, 62-608).

MUCH OFFERED, LITTLE REQUIRED

The legislature has not attempted to dictate policy to local governments. Much is left to the discretion of locally elected officials. The policy inherent in the laws relating to land use and local government is one of offering many powers to local government officials, but only requiring them to exercise a few. Only in rare cases has the legislature mandated the policy to guide the use of those powers. For example, the Montana Subdivision and Platting Act requires local governments to review certain subdivisions in a specified way, but it does not bind local officials to a decision making policy. Certainly, with regard to issues of purely local concern, this is as it should be.

Montana's land use policy at the local level is thus a composite of the policies of 126 cities and towns and 56 counties.

II. WHAT MIGHT BE DONE

LAND USE ACTIVITIES IN OTHER STATES

Montanans are not alone in their struggle to come to grips with the implications of land use decisions on the future. Similar efforts are occurring in county courthouses, town halls, and legislative assemblies throughout the nation. Seven states* in particular have moved to the forefront of this struggle by enacting and implementing a variety of land use policy legislation. The following is a review of their efforts. Also included is a review of the draft of the American Law Institute's Model Land Development Code, the culmination of a 12-year effort to replace the aging foundations of American planning and zoning law.

Not included here are the efforts of those states which have regulated only shorelines or coastlines. The circumstances surrounding such efforts, particularly the incentive and direction provided by the Federal Coastal Zone Management Act of 1972, make their experiences only marginally applicable in Montana.

There are common themes and distinctive contrasts in the seven state efforts. Each is the product of a unique combination of political and cultural forces as they were arrayed when the legislation was enacted. Yet some lessons and ideas from the experiences of these states are worthy of consideration by Montanans.

The state land use efforts reviewed demonstrate, for example, that state government can directly involve itself in the land use decision making process and must do so when local government cannot or will not act. The experiences of Hawaii and New York show that state government can exercise the authority to zone, however, most other states have rejected that option. In Vermont, Florida, Oregon and Colorado, people and local governments retain primary responsibility for land use decisions with the state supplying assistance and review. However, in each case local

*Hawaii, New York, Vermont, Florida, Maine, Oregon and Colorado. New York's action was confined to its Adirondack Park.

government is required to broaden its perspective and consider long as well as short-run considerations; the wide ranging implications of actions as well as localized effects.

State level involvement in land use is not without costs, both in money and in adjustments required in the expectations and perceptions of those being regulated. Additional costs to developers will be reflected in the price of their developments, and the cost of government review will be reflected in taxes. But what are the costs of not acting? These costs also can be measured in money--for additional services, for roads, for schools--as well as in lost values and amenities. The states reviewed here have decided that the costs of not acting far exceed the costs of state level involvement.

State level involvement is not an instant cure-all for all land use problems, however. In the seven states reviewed there remain difficulties. Insuring that all projects intended to fall under the purview of the legislation are included in the implementation procedure and that the decisions made under the procedure are enforced, is one. Coordination of the land use policy with other state programs, taxation in particular, is another. In most of the states difficulties are only beginning to surface, although they are clear in the Hawaiian case.

A serious problem common among many state programs is the limiting of the review of land use decisions to a case-by-case basis. Frequently, cumulative effects of many small decisions, and the basic question whether development should occur at all, are not considered. Recognizing this problem, Oregon, Hawaii and Florida have instituted programs to define the goals and priorities of their citizens.

In the seven states land use decisions have been opened up to public scrutiny. The decision makers have been forced to consider the effects of their decisions. And the whole process has increased public awareness of the implications of land

use choices. The mechanisms established also provide a means to guide future growth as the goals and desires of each state's citizenry are articulated.

A final lesson that emerges is the need for strong leadership in guiding land use legislation through a state legislature. In almost all the reviewed states the governor or the governor and a concerned group of legislators provided strong support for the legislation and worked hard for its enactment.

The experiences of other states can offer Montanans insights and ideas, but only Montanans can choose and implement a land use policy for Montana.

Hawaii

Passage of the Land Use Law (1961) made Hawaii the first state to express in law a modern awareness of the effects of land use on the quality of life available to the state's citizens. Hawaii took a strong stand, stronger than any other state which has followed, but perhaps the perception of land as a resource is particularly clear to those who live on islands. The Hawaiian effort is the only U.S. example of statewide zoning and offers the lessons of over 10 years' experience with this approach to land use regulation.

HOW IT WORKS

The Land Use Law and its amendments established the State Land Use Commission, directed the commission to classify all the lands of the state into four districts and authorized the adoption of rules and regulations governing land use within the districts.

The commission is composed of seven private citizens, appointed by the governor and confirmed by the senate, the director of the Department of Planning and Economic Development. The entire state has been divided by the commission into four districts stipulated in the statute: urban, rural, agricultural, and conservation.

Urban districts include substantially all currently urbanized areas plus a reserve of land theoretically sufficient to accommodate urban expansion for approximately 10 years. The Land Use Law requires a review of all district boundaries every five years. Uses permitted within urban districts are determined by county zoning regulations, but the county is not obligated to zone all land in the district for urban uses. Thus, county and state approval are required for most urban development.

Rural districts are characterized by low density residential development of a semi-rural nature. Lots must be a half-acre or larger (large lots by Hawaiian standards). This classification has been used quite sparingly.

Agricultural districts include crop and grazing lands plus sugar mills and other industrial activities associated with Hawaiian agriculture. Parcels must be at least an acre. Delineation of agricultural districts is based primarily on detailed studies of agricultural suitability. However, lava flows and other lands unsuited for agriculture are included in agricultural districts when conservation district criteria cannot be met.

The Land Use Commission regulates land use in the rural and agricultural districts and may issue special permits for certain uses, such as the location of a new town, in either kind of district. Such permits require the concurrence of the appropriate county planning commission.

Conservation districts include Forest and Water Reserve Zones (state-owned lands reserved for conservation purposes under earlier law), some private lands in mountainous areas of more than 20 percent slope (in 1969 at least a third of the land in conservation districts was privately owned (40)), and 20- to 40-foot shoreline buffer zone around the entire coast of the Hawaiian Islands. Land use within the conservation districts is regulated by the Department of Land and Natural Resources. Among uses permitted are cabins, residences, recreational trailers, resorts, hotels, golf courses, marinas, and governmental activities.

The Board of Natural Resources passes on all applications for permits within the conservation districts. As might be expected, there is a continuing debate over the activities that should be allowed in the districts (40).

Only the Land Use Commission may set district boundaries. From 1964 to 1973 there were 244 applications for boundary changes filed with the commission (42). Proposed boundary changes and applications for special permits are decided under specific time constraints established by the statute. A public hearing is held in the county where the land is located and the county planning commission reviews the request and offers comments. Six of the nine Land Use Commission members must vote for the boundary change to effect passage. It is particularly noteworthy that public agencies must obtain permits from the Land Use Commission or the Board of Natural Resources for their activities within rural, agricultural, and conservation districts.

EFFECTS AND PROBLEMS

The major effect of the Land Use Law appears to be the preservation of agricultural land and a compactness of cities. From 1964 to late 1970 the commission received requests to reclassify more than 100,000 acres to urban district status. Only 30,000 acres on the fringes of existing urban areas were reclassified, and of these only 3,500 acres were considered prime agricultural land. In addition, there is evidence that plantations are now planned for long-term growth and stability due to the assurances inherent in the Land Use Law. The flexibility of the commission allowed by its clear and powerful legislative mandate also enables it to play an active role in directing the pattern and rate of growth. The commission has the potential to become the main instrument for guiding the state's growth (41).

The Hawaiian system is not without its problems. Housing is very costly in Hawaii. The 1970 census estimated the median value of owner-occupied housing to

be $35,000--more than twice the national average of $17,000. It is argued that the containment of the urban areas and allowing only moderate expansion on the urban fringe has driven up the price of residential land and led to high housing costs (40). A consultant's report in 1969 concluded that the Land Use Law may have aggravated the housing shortage but other factors may have contributed including large profits made by builders, a shortage of heavy equipment and experienced construction workers, a choice by developers to construct only high cost housing because it brings a great return, and the amount and cost of required improvements on lots. Generally acknowledged is the problem of time delay between the application for agricultural or rural land reclassification (usually to urban land) and the ensuing approval by the county.

There have also been problems in carrying out the law. With its small staff the Land Use Commission cannot follow up on permits to enforce conditions and restrictions; nor can it check on development that might be occurring without a permit. The Land Use Law directs the counties to enforce the decisions of the commission but there is no check on this process. Similarly, the Department of Lands and Natural Resources does not have the staff to make field inspections of the areas for which permits are requested, let alone inspect for violations of conditions attached to permits that are granted.

The Land Use Law directs assessors to give consideration to the commission's classifications in making assessments, but this seems to have had little effect. (Hawaii has uniform statewide property assessment.) Some observers say the commission and the Department of Revenue even appear to be working at cross purposes; however, some of the difficulties can be traced to contradictions in the statutes (40).

County officials are said to be unhappy with several aspects of the Land Use Law. They like having control over urban development in urban districts through zoning but they resent the final authority of the Department of Land and Natural

Resources in controlling urban uses in conservation districts. It is also argued that county level planning now is more sophisticated than state planning and that the counties' recommendations should be given the greater weight in decisions of the Land Use Commission. (County decisions are required to be based on sound planning since the Hawaiian Supreme Court ruled that all rezoning must be supported by a comprehensive planning decision.) In addition, the Land Use Commission is said to maintain little contact with county public works departments and thus has no knowledge of the county's ability to provide public services to areas under consideration for reclassification to urban (40).

The credibility of the Land Use Commission has been hurt by accusations of conflict of interest. The commissioners also are said to show favoritism to their home island in land use decisions (40, 42). Considering the influence of the decisions made by the commission such accusations are not surprising. In addition, the circumstances surrounding the passage of the Land Use Law have changed; there is now some question about the desirability of preserving all agricultural land when the markets for Hawaiian pineapple and sugar have been depressed. The last few years have seen a number of unsuccessful attempts to alter the law.

LESSONS

Before considering the applicability of the Hawaiian experience to Montana, the circumstances surrounding passage of the Land Use Law must be studied. In 1961 any threat to the sugar and pineapple industries was a serious threat to Hawaii's economy. The draftsmen of the law and the owners and operators of large plantations saw such a threat in the gradual sprawling of Honolulu on to the prime agricultural land of the central valley of Oahu. Hawaii does not have much prime agricultural land to lose. Only 10 percent of the state's four million acres are suitable for crops. The great tourist boom of the late 1950s also was seen as a threat to agricultural land.

On the political front, there were few small landholders to feel threatened by the law; the large landholders considered it desirable. Nearly 90 percent of the privately held land in the state (almost half of the total area) is controlled by a small number of people. Such is certainly not the case in Montana.

Several other factors peculiar to Hawaii also must be considered. Hawaiians have long been accustomed to a strong, centralized territorial government and they had no tradition of local government. Before becoming a territory, Hawaii was ruled by a monarchy. Under its Polynesian law areas of land were decreed usable for certain purposes only. Alternative use of the land was subject to severe penalty--a system very similar to that of the Land Use Law (40). After statehood Hawaii retained simple governmental structure: four counties and the state (the city-county of Honolulu includes about 82 percent of the state's population). In addition, Hawaiians have long nurtured a conservation tradition.

One lesson Hawaiians have learned from their experience in regulating land use is that land use regulations alone cannot guarantee the protection of those values which make the islands such desirable places to live and visit. Hawaii is among leading states beginning to grapple with the basic growth questions that underlie land use issues. The 1973 Hawaiian legislature established a permanent Commission on Population and directed it to investigate the carrying capacity of the state regarding agricultural production, waste recycling and natural system regeneration.

The 1974 legislature adopted a resolution directing the executive branch and a joint interim legislative committee to analyze a report by the state's Department of Planning and Economic Development that recommended a slow growth policy for the state (43). The resolution specifically directs the development and submittal of recommendations to the 1975 legislature for action programs to implement the "slow growth" alternative outlined in the report.

Adirondack Park

Adirondack Park in upstate New York is another example of innovative land use controls applied by state government. The park includes approximately six million acres (twice the size of Yellowstone) and embraces all or part of 12 counties and 89 towns. Sixty percent of the area within the park boundary is in private ownership. The 40 percent in public (state) ownership has been protected since 1894 by a provision of the New York Constitution directing that these lands be kept "forever wild." There have been more than 100 efforts to weaken this directive in the last 80 years, almost all rejected at the polls.

Long a playground for the wealthy, the Adirondack Mountains have experienced a tremendous increase in use over the last 30 years. About five years ago, a private study recommended turning the area into a national park. This suggestion irritated many New Yorkers who felt that the state had been, and could continue to do a better management job than the federal government. The change in character that would result from national park status was said to threaten the subtle values of the park. The governor responded by appointing the Temporary Commission on the Future of the Adirondacks, which recommended a permanent park agency and the preparation of a park plan.

Continuing where the temporary commission left off, the Adirondack Park Agency developed a sophisticated plan and land use program to guide future park development. The plan and program is quite complicated, rich in detail, and not easily summarized. There are really two plans: one for the public lands, and one for the private lands. The first needed only the approval of the governor, and this was obtained in July of 1972; the latter needed to be enacted into law because it dealt with private property rights and was extremely controversial. The private land use and development plan passed the legislature on May 14, 1973 by a 117 to 12 vote in the Assembly and 52 to 3 in the Senate. The governor

signed the bill into law the following week (44).

HOW IT WORKS

The master plan for the state's 2,275,000 acres of park classifies the land into four broad categories: wilderness, primitive area, canoe area, and wild forest. In addition, there are intensive use (major travel corridors) and special management (wild and scenic river) areas.

The master plan for the private land places each parcel into one of six use categories: industrial, hamlet, moderate intensity, low intensity, rural, or resource management. For the last four categories, general density guidelines and lists of compatible land use activities were issued to reflect the land's ability to withstand use and maintain its general character. The purposes and objectives of each use category are explicitly stated in the plan. Density guidelines and compatible use lists were not developed for hamlets or industrial use areas. The development of such areas is left to local discretion in hopes that a diversity of environments will result. There are also comprehensive shoreline restrictions throughout the park with varying requirements for each use category.

The densities in the guidelines range from 15 principal buildings per square mile (approximately one building per 42 acres) in resource management areas to 500 buildings per square mile (approximately one per acre) in moderate intensity use areas. Determining density for a particular area further depends on such factors as soil conditions, slope, elevation, wildlife habitats, and the ability of local government to provide services. The effect of the plan can be illustrated by noting that 53 percent of the private land has been designated as resource management area and that the next most restrictive category, rural area, includes an additional 32 percent of the private land (44).

Responsibility for administering the Adirondack Park plan and land use program is shared by local government and the park agency. Enforcement is through

a permit system. Certain specified types of development (the type varies with the use category) and development in critical environmental areas are reviewed by the agency irrespective of local government jurisdiction. Jurisdiction over other specified types of development is given to those local governments that have land use programs approved by the park agency. If the local government does not have an approved program the development is reviewed by the agency. However, in all cases the agency has standing to participate in local review and to seek judicial review of permits granted by local government.

EFFECTS AND PROBLEMS

Perhaps it is too soon to see what the effects of the Adirondack Park management program will be. Certainly, it has stopped the land rush that was beginning in the late 1960s. There will be very few large second home developments in the park. The town of Altamont, population less than 6,700 in 1972, will not grow into a suburb of 640,000 as would have been permitted under its zoning ordinance. The effects on the local economy are still unpredictable. The area is poor, with high unemployment and a dependency on logging and recreation businesses. The forest products industry complains that there are insufficient industrial sites within the park, and that the cost of hauling to available sites will hurt the logging industry. This same group traditionally has been unhappy with the "forever wild" directive in the Constitution (45).

Adirondack Park is quite expensive to the people of New York. The state pays about $6 million a year in lieu of taxes on the state lands. The executive secretary of the Northeastern Loggers' Association has estimated that opening up all state forest lands in the park to "intensive management" would save the state an additional $46 million a year (45). In addition, the state has made money available to aid local governments in developing land use programs. The whole question of taxes and the park is under investigation by the State Board of

Equalization and Assessment. The board will submit a final report with recommendations to the governor and the legislature in early 1976.

LESSONS

The Adirondack Park example shows that the state can zone, both in cooperation with local government and by superseding local government. The park experience also demonstrates that when the people of a state have enough interest in protecting a district they may do so with only reasonable consideration for the local economy. But Adirondack Park is a special case and the experience is not easily transferable.

Whether it is a park or not, the Adirondack Park name has maintained a special significance to New Yorkers. The park preserves what once was and represents a haven where the air is still clean and fresh, most lakes and rivers are clear and unpolluted, and the mountain streams provide water that does not have to be treated for drinking. Given the circumstances it is not difficult to understand how the 19 million New Yorkers who do not live in the park could decide to trade some of the expectations of the less than a quarter million landowners who do live there for the preservation of the integrity of the park. It is hard to imagine similar circumstances occurring in many other areas, particularly in Montana.

Vermont

With the passage of Act 250, the Land Use and Development Control Law, in 1970, the Vermont legislature demonstrated that one of the country's most rural state legislatures also could be one of the most progressive. Vermont had been a rural enclave lying north of the Washington-New York-Boston megalopolis and south of the recreation sphere of Montreal. The 1960s brought interstate highways, generally increased mobility and 55,000 new residents--an increase of only 15 percent, but five times the increase of the previous 10 years (46).

Taxes continually increased in response to demands for expanded services. The trend toward agglomeration of the traditional Vermont small holding into larger farms accelerated, but perhaps the last straw was an announcement, in the summer of 1968, of plans for a 20,000-acre development on hilly land covered by thin soils, clearly unsuitable for septic tanks, in the southern part of the state. The project was being proposed by a subsidiary of the paper company that had owned the land for decades.

A Commission on Environmental Control was established by the governor and immediately recommended State Health Department review of water supply and sewage disposal on projects of three or more lots of 10 acres or less. The final report of the commission recommended strong state intervention in the regulation of land use--an idea that historically would have been opposed by most Vermonters. Yet Act 250, the bill embodying the recommendations, passed almost unanimously.

Many factors contributed to the passage of the act. The year 1970 saw nearly universal concern about the environment and Vermonters were tired of the misuses of land they had seen occurring in their state. But existing law required a town plan before a town could implement controls over land use. (In Vermont, local government is at the township level.) There also was a generally recognized lack of planning competence at the local level. It was seen that preparing town plans could prevent action in most areas of the state for many years. The only alternative was to sanction a strong state role (40, 47).

HOW IT WORKS

Act 250 established a permit process for the following activities: housing or trailer park developments of more than 10 units; commercial or industrial improvements of more than 10 acres; subdivision of land for sale in parcels of 10 or fewer acres; and any development on land higher than 2,500 feet above sea level. To encourage local government responsibility, permits are required for all

commercial and industrial developments of more than 1 acre (instead of 10) in towns without permanent zoning and subdivision regulations. The permit process also applies to developments proposed by state and local agencies.

The act divided the state into eight districts; established a district commission in each to implement the permit process; and established a State Environmental Board to oversee the permit process, hear appeals from aggrieved parties and perform certain specified planning functions.

Each district commission comprises three local residents appointed by the governor. The chairman serves a two-year term; members serve staggered four-year terms. The commissioners work part time and receive $25 a day for expenses. Initial review of all permits is done by these local, lay citizens, and the general acceptance of the permit process has been attributed in part to this system. It avoids arousing the distaste many people have for far-removed bureaucratic authority (46).

The Vermont Environmental Board is an independent regulatory agency composed of nine lay citizens appointed by the governor. Members serve four year terms; the chairman is appointed for two years but serves at the pleasure of the governor. The board meets about four times a month and members receive $25 per day. The board is within the Agency of Environmental Conservation for administrative purposes and may draw upon agency's staff. In addition, the board has a small staff of its own including area coordinators, who work with the district commissions and the field investigators who are in charge of enforcement.

The permit process begins when a party desiring to undertake a project falling under the purview of the law files an application with the appropriate district commission and notifies the affected municipality and regional planning agency. A copy of the application is sent to the Agency of Environmental Conservation, which prepares, with the help of other state departments, a position statement on the application. State level review, which includes an investigation of the

project's impact on roads, schools, and the local economy, is coordinated by the Act 250 Interagency Review Committee; it meets biweekly, and includes the Departments of Health, Highways, and the Agency of Development and Community Affairs.

The district commissions hold public hearings on all applications. Adjoining property owners, local and regional planning agencies, and local government members are parties to the application by law. In addition, the district commission may allow any interested citizen or group of citizens to testify and often invites comments from parties who apparently represent an involved interest. The style of the hearing varies somewhat from district to district, but generally it is informal and the commissioners rarely conduct their own investigation. Usually they act solely on the record presented to them.

To approve a permit the commission must find that the project is consistent with criteria in the statute. Briefly, the project must not cause undue air or water pollution, place an unreasonable burden on existing water supplies (the project must have an adequate supply of water), highways, schools, or other government services, result in excessive erosion or have an undue adverse effect upon scenic, historic or cultural values of an area. The application must conform to state plans, when adopted, and the attorney general has ruled that an application also must conform to adopted local and regional plans. However, most sub-state plans are too general to offer much guidance (40).

The district commission may deny an application, approve it, or approve it with conditions. The latter alternative is used most of the time, and the power to impose conditions has been applied broadly by the commissioners. Conditions have included protective covenants and specifications for plumbing and electrical wiring. The type and specificity of conditions appears to vary from district to district and some say this is a reasonable reflection of the differing concerns throughout the state.

The decision of a district commission may be appealed to either the Environmental Board or a county court. Further appeal can be made to the state Supreme Court. The law grants appeal to the applicant, a state agency, the regional and municipal planning commissions and the municipality affected. The board, however, generally accepts comments on an appeal from any party which appeared before the district commission. Acting on an appeal, the board schedules a new hearing and bases its decision on the same criteria that govern the district commissions. New issues or additional proof may be presented to the board.

Act 250 also directs the Environmental Board to prepare and adopt a series of three plans to guide district council and board decisions. First, an interim capability plan setting forth the ecological constraints on development. Second, a capability and development plan attempting to reconcile ecological capability with citizen desires and future needs and establishing state goals for development. Third, a state Land Use Plan translating the goals into detailed maps of land use designations.

The exact purpose of the Land Use Plan has become somewhat muddled. Originally, it was recommended that the plan be adopted by the Environmental Board and approved by the governor, but not the legislature--making it a generalized guideline not expected to be followed exactly. However, during the debate on Act 250 the legislature decided to reserve to itself final approval of the plan after the board and the governor had endorsed them. This stipulation would give the Land Use Plan the effect of law.

Both the interim land capability plan and the capability and development plan passed the legislature on schedule, but the Land Use Plan was not enacted by the 1974 legislature. Actually delineating areas where certain kinds of development could or could not occur came as quite a shock to many legislators. The proposed plan aimed to encourage local land use plans by allowing local government time to act before the state acted. However, not even weak drafts

developed during the session could appease all interests (46). The legislature established a study committee in 1974 to review the rejected plan. The committee has construed its powers broadly and is preparing its own proposals to shift the state's role to the regulation of critical areas and of developments of regional concern rather than the development and implementation of a statewide comprehensive land use plan.

EFFECTS AND PROBLEMS

A major benefit of the Act 250 permit process has been the ability of the district commissions to enforce existing but previously poorly enforced state and local environmental controls. In addition, the Interagency Review Committee has created important communication channels among state departments to exchange views on policy and coordinate activities (40).

Most Vermonters agree that the permit process has improved the quality of growth; many believe that it has slowed the rate of growth. But it is very difficult to substantiate the effect on the rate of growth since this would require knowing what has not been built as well as what has. A 1973 study by the Conservation Law Foundation described Act 250's impact as "improving development rather than directly forbidding it, and...not a mechanism for directing the rate and location of growth (46)."

There are many problems with the exemptions and limits written into the original law. The "grandfather clause" could allow an increase of a -third in the number of housing units in the state without any review, and the highway department insists that many new roads fall under the provisions of the clause.

Acreage requirements in Act 250 bear little relation to the potential for environmental harm a project may offer. As with Montana's subdivision law, there has been a proliferation of projects just beyond the acreage limits in the act.

Signs advertising "lots--10+ acres" are as common in Vermont as in Montana (40). It has been estimated that only 20 to 30 percent of all development comes under Act 250's purview (46).

The exemption of all construction for agricultural, logging, and forestry purposes on land at elevations of less than 2,500 feet reflects the view that the interests of farmers and timber owners coincides with the public interest if the land remains in open space. This is not always so.

The costs of development also have increased as a result of the law; some estimate by as much as 10 percent (46). Although it is true that the additional requirements probably will result in long term savings to the community (if not the individual home owner), the greater initial development costs tend to favor the big time developer.

The effects on the availability of housing have been mixed. The commissioner of housing admits a minor effect in raising the cost of first homes for Vermonters, but also points out that it may be helping to increase the supply of first homes. He points to a case where a developer scrapped a plan for recreational home development after the district commission's hearing and is planning instead a project including first as well as second homes (46).

The Environmental Board has tried to answer the reasonable complaints of developers concerning the number of permits required by various state and local agencies but the board has been only partially successful in reducing the number of permits required. All permits issued within the Agency of Environmental Conservation have been consolidated.

Enforcement of the law in general and of the conditions attached to permits by the commissioners has been particularly troublesome. The act provides stiff penalties for violations, but the board has had to rely on the efforts of officials in other departments within the Agency of Environmental Conservation for field investigations. Large developers tend to comply because local residents are very

aware of their actions, but many state officials believe that many small developments theoretically covered by the act occur without review. The act does require that the property transfer tax form required to accompany every sale of land in the state include a certificate of compliance with or exemption from Act 250. This certificate must be signed under oath by the seller, and a copy is sent to the Agency of Environmental Conservation.

LESSONS

The Vermont experience underscores the important benefits derived from giving local citizens the power to review projects: ordinary local citizens, not so-called experts, and definitely not experts off in the capital. Vermont's existing regional planning commissions were not given the review power for the same reason; they had become experts (46). The strongest power the district commissions have is that of persuasion; this power can best be exercised by respected local residents. Vermont has been lucky in being able to call upon many of its citizens to devote long hours to reviewing plans with only minimal compensation.

Vermonters also have learned that a permit process by itself is not enough to guide growth or control the future of their state. They have acknowledged the need for a growth policy and have completed the first two steps of a process that may someday establish clear guidelines for the state's future. They also have recognized the need to coordinate land use planning with other state activities, particularly taxation. In 1973 the Vermont legislature enacted a capital gains tax on land speculation which has succeeded, in the opinion of many, in slowing speculative land sales. House Bill 651 introduced and killed in the 1973 Montana legislature was modeled after the Vermont law.

But perhaps the most important lesson of the Vermont experience is that when conditions are bad enough the citizens of a state will sanction what is for them

extreme measures to rectify the situation. Montana is not yet suffering the severe development pressure that Vermont faced in the late 1960s, but must we wait until we are before we act?

Florida

During the 1960s, 4,500 new residents moved to Florida each week. By early 1974 the rate had climbed to almost 6,000 new residents a week with some 57,000 acres of land becoming urbanized each year to accommodate the influx. In the face of such growth many Floridians have become concerned that the amenities and the quality of life which make Florida a desirable place to live are being lost.

The cities of Tampa and St. Petersburg waged a slowly escalating battle over water for about 40 years until 1971, when the worst drought in history struck southern Florida, the "most prosperous, the most populous, the fastest growing and most glamorous part of the state (48)." Over 750,000 acres of Big Cyprus Swamp and the Everglades, areas hydraulically linked to the aquifers of the most populous areas of southern Florida, dried out and caught fire.

Out of a governor's conference called to consider water management in south Florida grew a task force that eventually prepared a package of legislation and presented it to the 1972 legislature. In April of that year four bills were enacted: the Florida Land Conservation Act, the Florida Water Resources Act, the Comprehensive Planning Act, and the Environmental Land and Water Management Act (Act 380). The latter is of major concern because it deals directly with the regulation of land use. Florida, another state noted for its conservatism, thus moved to regulate the use of land in a progressive, if not radical manner. Florida had been one of the last states to permit counties and cities to zone. Twenty-eight of its 67 counties and a -third of its 400 municipalities lacked minimum zoning or subdivision regulations when Act 380 was passed. However, not all local governments waited for state assistance.

Citizens of Dade County (includes Miami and Miami Beach) passed a referendum enabling residents of an area of the county to petition the county manager to place a moratorium on all building in their area until the capacity of public services could be examined. A dozen such moratoriums were enacted, affecting areas from 40 acres to 50 square miles. Addressing the cause of land misuse, the citizens of Boca Raton passed a charter amendment providing that no more than 40,000 dwelling units could be constructed in the city.

In addition to the environmental concerns of Floridians there were several additional factors that allowed fundamental change to take place. Citizens had lost faith in the ability or willingness of local government to carry out their wishes concerning community development. A number of land use scandals involving local government officials received wide attention in the press and on television (48). Reapportionment had altered the character of the legislature. For the first time there was strong representation of urban and suburban interests. Governor Reuben Askew introduced Act 380 personally to the legislature as his top priority and used his influence throughout the session. When the session ended with the bill stalled in the house, he extended the session for an additional week to allow passage (48).

Act 380 is modeled after a 1971 draft of the American Law Institute's Model Development Code, the first effort to review and revise the basis of land use zoning law since 1924. In the Florida act, state involvement in land use decision making is quite selective and is triggered by a specific type, size or location of development. The great majority of land use decisions are unaffected by the act.

The governor's task force had considered many alternative methods of land use control before proposing what became Act 380. A bill resembling Hawaii's statewide zoning system had been introduced in the previous session, but the task force decided against the Hawaiian approach for a number of policy and practical reasons. The task force felt that land regulation should remain as close to

those affected as possible, that there should be recourse to convenient protection from delays and arbitrary action, and that a large centralized bureaucracy should be avoided. A state level effort centered in the capital city would satisfy none of these requirements.

HOW IT WORKS

Under the Florida statute the state is involved only with Areas of Critical State Concern and Developments of Regional Impact (DRI).

An area can be considered for designation as an Area of Critical State Concern for any of three reasons:

1. The area contains or has a significant impact on environmental, historical, natural, or archaeological resources of regional or statewide importance.

2. The area is significantly affected by, or has a significant effect on, an existing or proposed major public facility or other area of major public investment.

3. The area is designated on a state land development plan as possessing major development (such as a new town) potential.

The Division of State Planning identifies the critical areas, prepares a report on proposed selections, and recommends boundaries and guidelines for development within the boundaries. The governor and cabinet review the recommendations; if they approve them the local government having jurisdiction over the area involved has six months to prepare and implement regulations based on the principles. If the local government fails to

act the state will prepare the regulations and local government can be forced to implement them by court order. (It should be noted that the Florida cabinet is a unique institution consisting of six independently elected state officials. Each has his or her own constituency and the governor cannot count on their support.) The statute limits the amount of the state that can be designated as critical areas to 5 percent or 1,670,000 acres and further limits to 500,000 acres the amount of land that can be designated in any year.

Developments of Regional Impact are any developments which because of character, size, or location have substantial effects beyond the boundaries of the county in which they are located. Criteria for defining DRIs based on county population and the size and projected impact (number of dwelling units, acreage, floor space, parking spaces) were prepared by the division of state planning and a special study committee, and approved by the governor, the cabinet, and the legislature. The criteria are not all-inclusive, however, and a local government may designate a development as a DRI even though it does not fit the criteria exactly (49). Agricultural use of land, and highways and utilities on existing rights-of-way are exempted from all provisions of Act 380.

The DRI process begins when a developer files a permit application with a local government and copies are sent to the state and the appropriate regional planning agency. The regional agency then has 30 days to prepare an environmental assessment and recommendation which the local government must consider before deciding whether to deny, approve or conditionally

approve the application. Three situations can occur:

1. The development is proposed in an Area of Critical State Concern, in which case it is subject to the regulations prepared for that area.

2. The development is proposed in an area with existing zoning or subdivision regulations. The regional planning agency has 30 days to prepare an environmental impact review which includes economic and social considerations. The local government must consider the recommendations of the regional agency when it reviews the application. The local government can approve, conditionally approve, or deny the developer's request.

3. The development is proposed in an area without local controls. The local government then has 90 days to enact controls, which produces the situation described in No. 2 above. If the local government takes no action the developer may proceed. The developer remains responsible for obtaining whatever state permits may be required by pollution and dredge-and-fill regulations.

Decisions regarding DRIs and development in Areas of Critical State Concern may be appealed to the governor and cabinet sitting as the Florida Land and Water Adjudicatory Commission by the property owner, the developer, the appropriate regional planning agency, and the division of state planning.

EFFECTS AND PROBLEMS

The implementation of Act 380 has been slow to build up momentum. The ability of the state planning agency to intervene in land use decisions with status equal to the developer had some immediate effects. But inadequate funding and the pervasive weakness of regional planning agencies has resulted in a generally slow beginning. In addition there were several stipulations written into the statute which guaranteed delay.

Areas of Critical State Concern could not be designated until the voters approved a $200 million bond issue to purchase endangered lands, even though the purchase of all critical areas was not the intent of the law. In most cases reasonable regulation would achieve the desired degree of protection. The bond issue passed in November 1972 by a 3 to 1 majority.

The act insured at least a year's delay in the DRI process by requiring the state definitions of DRIs to be approved by the legislature, the governor and the cabinet. Working out procedures for intergovernmental cooperation and naming the regional agencies to review DRIs added to the delay. Not until July 1, 1973, 15 months after Act 380 became law, did the DRI process begin to function.

When Act 380 was enacted there were only two fledgling regional planning councils and several loosely organized multi-jurisdictional bodies in Florida. Now there are 10 regional planning districts covering the state, and seven organized regional agencies responding to DRI applications. The size and capability of the agencies varies greatly and the inherent weakness of voluntary associations of "sovereign" counties plagues them all (48).

LESSONS

Again it is much too soon to gauge all the effects of a fledgling land use law. Based on the experience of the first six months of operation of Act 380's

DRI process, observers have reported an improvement in the quality of development, an increase in the cost of housing, and no noticeable effect on the rate of development. Proponents of subsidized housing claim the process has hurt their efforts without offering them any help. (Act 380 does not give the state authority to override local veto of projects of regional benefits, such as subsidized housing.) (48, 50)

State officials estimate that 10 to 50 percent of all the development in Florida comes under the DRI process--obviously, more a guess than an estimate (48). As is the case with Montana's subdivision regulations, the limited coverage of the DRI process has spurred developers to seek ways to avoid it. Until the 1974 Florida legislature prevented cities from annexing undeveloped areas, developers built in areas without local controls or induced receptive cities to annex them away from county regulations and thus from the DRI process. The DRI size criteria still allow developers to reduce the size of project proposals and escape controls.

Moreover, there are a number of technical problems with the law. The most significant is the lack of interim control. During the period between the passage of the law and its implementation, and now during the period between the designation of an Area of Critical State Concern and the implementation of the regulations, development activity increases to avoid the law (48).

The law also is limited in its application because it fails to consider three key problems of land use. First, a process oriented toward large development is inherently unresponsive to the cumulative effects of a number of small developments. Several projects under the DRI threshold may have a total effect substantially greater than a single DRI, yet they fall completely outside the purview of Act 380.

Second, providing special protection for a few critical areas in a large state where much of the area is environmentally sensitive is to some degree self-defeating. In Florida it has resulted in a great deal of bickering over boundaries of critical areas when the real issues are basic state policies regarding the use

of land. This point may not seem to have valid application in Montana, yet the quality and style of life currently enjoyed by Montanans is vulnerable throughout the state.

Third, and perhaps most significant, Act 380 created a decision making process without defining policies to guide the decisions. The law stipulates the factors decision makers are to consider, but it does not address how they are to weigh them. It does not even make clear how much consideration a local government must give to the recommendations of the regional agency. Without stated policies, Floridians are losing the opportunity to guide their future, to try and direct growth to those areas where it is needed, and to make Florida into what its citizens would like it to be.

Like Montana, Florida is a large and complex state with a strong tradition sanctioning freedom for landowners to do what they will with their land with only minimal regard for the rights of society at large. Under the Florida system local government makes the decisions regarding the regulation of land. With Act 380, the state established guidelines that the local government must operate within, and provided an appeal process. But to expect land use decisions to be made fairly with due consideration, local government must have strong administration. The state must be willing to lend technical and fiscal support to local government.

The major lesson of the Florida experience is that a land regulation process in a policy vacuum is insufficient remedy for land use ills of a state. Any serious land use policy must consider growth policy. Florida learned this lesson. In October 1973 Governor Askew opened a conference on growth and the environment. The 1974 legislature enacted a broad state growth policy, but did not pass the package of legislation implementing the policy (51). Nonetheless, it was a beginning.

Florida also serves as an example of what can be accomplished with strong leadership. The passage of Act 380 is attributed by most observers to the pragmatic

and skillful efforts of a select group of state senators and the unflagging support of the governor. A final lesson is provided by Jay Landers, an aid to Governor Askew. "Don't study this thing to death," he says. "The thing to do is to do something. It's a big mistake to wait." (48)

Maine

Proposals for four major oil ports and refineries along their beautiful coast in one year was the last straw for many residents of Maine. While the only real deepwater ports along the Atlantic coast of the United States attracted the oil men, the hills, the abundance of lakes and streams, the predictable snow, long having attracted the tourist, began to attract the second home buyer. The new interstate highways brought 70 million people within a 24-hour drive of Maine's relatively unspoiled and quite lovely landscape.

Maine's citizens, known for their reverence of unencumbered property rights, decided they had had enough. In 1970 and 1971 the Maine legislature passed a package of three strong land use laws. A Site Selection Act and a Wildlands Act were enacted in 1970 and amended in 1971, and a Mandatory Zoning and Subdivision Control for Shoreland Areas Act was enacted in 1971. The 1974 legislature added a Register of Critical Areas Act to the package.

Maine towns had consistently resisted land use regulation. Only 15 percent of the municipal corporations in the state were zoned in 1971 and, of 497 units of local government, over 400 had no planning organization (40,52). The Maine Yankee's penchant for local government is indicated by noting that Maine, with a population of approximately one million, is organized into almost 500 units of local government in a land area of about 10 million acres. (The state includes a little over 21 million acres but 51 percent of the state is without local government.) In Montana, a population of 700,000 is spread over 93 million acres and organized into 182 local government units.

By mid-1972 only 15 percent of Maine's coastal towns had adopted land use ordinances; in 1970 the figure had been even lower. Unwilling to act locally but knowing a lack of action would bring exploitation, the citizens turned to the state government for help. The Site Selection Act, which requires developers of all large industrial and commercial projects to obtain a permit from the Maine Environmental Improvement Commission, was the response. Passage of the bill was eased by deletion of a provision which would have explicitly included "residential" development, and inclusion of a liberal "grandfather clause" and exemptions for the powerful forest products and electric power industries (40,52).

HOW IT WORKS

The Site Selection Act is administered by the Department of Environmental Protection under the direction of the Board of Environmental Protection. The board and department also have been assigned the responsibility for the mechanics of Maine's anti-pollution laws including water quality permits, municipal storm and sanitary sewers approval, air quality standards, and permits for dredging, mining and development within wetlands.

The Site Selection Act requires the board to "control the location of... developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings." Developments controlled by the law include:

> any commercial or industrial development, including subdivisions... which require [sic] a license from the [Board of Environmental Protection], or which occupies a land or water area in excess of 20 acres, or which contemplates drilling for or excavating natural resources, on land or under water, excluding...pits of less than 5 acres, or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

Early on, the board construed "commercial" development to include residential subdivisions larger than 20 acres. The board contended that the subdivision of

land for the purpose of selling lots is obviously a "commercial" activity, and that the term "residential" had been dropped from the law because it was redundant. The act also has been extended to developments of public agencies, and the provisions applying the act to any development requiring a permit from the board under any law greatly expanded its reach. Additionally, small projects that might create unacceptable environmental impact have been reviewed on occasion (52).

A project coming under the act requires a special permit, in addition to any others required by law, and must satisfy four criteria specified in the law:

1. The developer must have the financial capacity and technical ability to meet state air and water pollution control standards. He must have made adequate provisions to dispose of solid waste, to control offensive odors, and to secure and maintain a sufficient and healthful water supply.

2. The developer must have made adequate provision for traffic movement out of or into the development area.

3. The developer must have harmoniously fitted the development into the existing natural environment to prevent adverse effect on existing uses, scenic character, natural resources and property values in the municipality or in adjoining municipalities.

4. The proposed development must be built on soil types suitable to the nature of the project.

The board may deny, approve, or approve with conditions the site choice of a developer. Extensive use has been made of the power to attach conditions to permits. Permit applications are circulated to all state agencies having useful expertise. Although many officials resent the additional work load, they appreciate the opportunity to make enforceable recommendations. For example, the soil conservationists have seen the preservation of topsoil on building sites, a long-term goal, made a requirement (40).

The act has been interpreted to require a hearing by the board on a permit denial, but not on an approval. However, the board holds hearings on all major and controversial permits. The law allows 30 days for appeal of a decision of the board to the Supreme Court of Maine. The court's review is limited to the record of the hearing and board order. In an early case the court affirmed the constitutionality of the Site Selection Act.

The Board of Environmental Protection comprises 10 private citizens appointed by the governor with the approval of the Executive Council (which may be controlled by the opposition party). The members serve three-year terms and receive modest per diem and travel expenses. The law stipulates that two board members are to be chosen from each of the following interest groups: manufacturing, conservation, local government, general public, and air pollution experts. The commissioner of the Department of Environmental Protection, an appointee of the governor, is chairman of the board but votes only in case of a tie.

The permit process is initiated by the developer when he files an application, called a Record of Intent, consisting of a 25-page form designed to elicit maximum information from the developer. The developer is encouraged to meet with the staff of the department before filing the application. He also is responsible for obtaining the comments of the local government. The Department of Environmental Protection coordinates the permit clearance and recommendations among state agencies.

The Wildlands Act as amended in 1971 established the Land Use Regulation Commission (LURC) to regulate land use throughout the approximately 50 percent of the state that lacks local government. Roughly 90 percent of this unorganized area is privately owned, primarily by large forest products companies.

The commission is an independent seven-member body within the Department of Environmental Protection. The law directs the commission to complete a comprehensive land use guidance plan, to delineate temporary land use guidance districts and adopt interim land use guidance standards by January, 1975. There are four

types of land use guidance districts, or zones: protection, management, development and holding. Only harmonious land uses are permitted within each district, and specific rules, the land use guidance standards, control development in each. The act carefully outlines the district delineation process and makes quite clear that its purpose is the "preservation of the ecological balance" (53).

All development within the unorganized area of the state, excluding commercial forestry and agriculture occurring in management districts, requires a permit under the Wildlands Act (unless covered by the Site Selection Act). Review of permit applications is based on the four criteria of the Site Selection Act plus conformance with the land use guidance standards for the district.

The LURC acts as both state and local government for the unorganized areas. However, when a local government is formed development is regulated by the commission until that government prepares and adopts development regulations as restrictive as those of the state.

The Mandatory Zoning and Subdivision Control for Shorelands Act requires local governments to adopt subdivision regulations and zoning controls for areas within 250 feet of any navigable waters by July 1974. If a local government fails to adopt controls, or if enacted controls are found unacceptable, the Board of Environmental Protection and the LURC, after consulation with the State Planning Office, will adopt regulations to be enforced by the local government.

The Register of Critical Areas Act has just gone into effect. It initiates a statewide inventory of important scenic, scientific, and historic, and critical natural areas. Localities must develop plans for the protection of designated areas within six months after listing in the register (54).

EFFECTS AND PROBLEMS

The Site Selection Act clearly established state level control over the siting of major industrial and commercial development. Even with an initial staff of two

the board quickly became known for its effectiveness. In 1971, the retired president of the Maine Homebuilders Association called the board the most powerful instrumentality in the state (40).

Surveillance of development activity throughout the state is primarily through voluntary compliance and informal channels. A local conservationist might call the board when a new project appears imminent in his area; the field personnel of various state agencies report new activity. The board is plagued with permit enforcement problems and a system for issuing certificates of compliance to projects completed in accordance with the permit terms is being considered.

The decisions of the board have been criticized for aggravating Maine's housing shortage and for ignoring social and economic considerations. Unfortunately, the Site Selection Act does not include social or economic concerns in the criteria for considering a permit application. In an economically depressed state the lack of concern for social and economic considerations may lead to questions of whether the board is truly representative.

Maine natives are being caught between rising land taxes and inflated property costs with little opportunity for additional income. In the eyes of long-time residents who can no longer afford to build houses on the land, mobile homes are seen in distinctly different light than they are by recent immigrants from New York City. If the board continues to exercise its power without achieving a true planning perspective in decision making, it may lose its present wide support.

Probably the greatest single shortcoming of the Site Selection Act is the lack of criteria and performance standards against which the long-term and cumulative effects of developments can be judged. At some point, for some localesthe board will have to decide that additional industrial or commercial development will not be allowed, yet this decision will have to be expressed by repeated permit denials rather than by an open declaration of policy.

On the other hand, the Wildlands Act links regulation to a desired future.

Landowners know the range of uses to which their land may be put and they have available to them a process for altering that range. The problem connected with this law pertains to the authority of the Land Use Regulation Commission over forest lands in management districts when the owners become more interested in recreational development than in commercial forestry.

In general, however, the Board of Environmental Protection has centralized and focused state authority, reduced state agency competition, and produced a symbol of state identity in the area of environmental protection. The agency has a significant influence on potential development simply through its existence.

LESSONS

The highly centralized approach of the Site Selection Act seems very appropriate for a small state lacking a regionalized population and where a high value is placed on the protection of natural resources. Actions of the Board of Environmental Protection are closely covered by the news media and the average Maine citizen knows that its members are the key land use decision makers in the state. Of course, the success of the board, like that of all boards and commissions, depends on the quality of its members. So far the members have taken their responsibility seriously, have given thoughtful consideration to staff reports and appear to be sensitive to public concern (52).

But even in Maine the trend is away from decision making at the state level and toward increased decision making at the local level pursuant to guidelines and standards reviewed or prepared by the state. The Mandatory Zoning and Subdivision Control for Shoreland Areas Act is an example of this trend.

The Maine experience also demonstrates the limits of a purely regulatory approach. The board, acting under the Site Selection Act, cannot respond to the need for increased job opportunities and adequate housing, nor can it address the question of whether an area should continue to grow. The Land Use Regulation

Commission, operating under the Wildlands Act, can respond to all three questions and substantially more.

Oregon

Well-known for their "visit but don't stay" advertising, Oregonians also felt strongly enough about the misuse of their state's land to enact a package of innovative and far-sighted land use laws.

In addition to a land use bill, the 1973 Oregon legislature enacted legislation protecting farmland from taxation at urban or suburban rates; protecting the buyers of subdivided land; modernizing subdivision regulations, and redefining the role of city and county planning commissions and providing for the representation of a variety of interests on the commissions.

The state previously had moved only slightly into the area of land use regulation. In 1969 the legislature declared that all cities and counties must zone their lands by December 31, 1971 or the state would step in and zone. However, the law did not provide a mechanism for reviewing or coordinating plans among localities, or appropriate money to carry out its intent. The 1971 legislature set an important precedent for direct state involvement in local planning when it established the Oregon Coastal Conservation and Development Commission to develop comprehensive plans for the coastline. Although the members of the commission are primarily coastal dwellers, the commission reports directly to the legislature.

During 1972 the public was made aware of many problems resulting from the misuse of Oregon's land. Along a short section of coastline the state health department found 34 sites where raw sewage flowed directly on to ocean beaches. A cursory check of subdivision activity east of the Cascade Mountains discovered about 160,000 acres of arid rangeland and desert subdivided into 43,000 parcels in connection with an estimated 1,000 illegal promotional schemes. Oregonians also began to fear that the Willamette Valley, the heart of the state and home to

half its population, was fast becoming a continuous suburban sprawl from Portland to Eugene--just like California's Santa Clara and San Fernando Valleys (55).

The governor's fifth Conservation Congress in November of 1972 was devoted to land use. At the congress pleas were made for strong action; State Senator Hector MacPherson and a group of citizen volunteers completed preparation of what was to become Senate Bill 100, the land use bill.

After an extremely difficult passage, involving substantial revision and compromise, a land use package emerged from the legislature and was signed into law.

HOW IT WORKS

The heart of the package, Senate Bill 100, created the Department of Land Conservation and Development operating under a Land Conservation and Development Commission (LCDC). The commission, consisting of seven citizens appointed by the governor with the consent of the senate, is charged with developing and adopting by January 1, 1975, goals and guidelines for the use of land in Oregon, assuring widespread citizen involvement in all phases of the land use decision making process, coordinating state and local land use planning, and inventorying land use throughout the state to identify areas of critical state concern for consideration by the legislature.

To accomplish the first two charges the commission has organized a large, well-planned, and well-financed public involvement effort. Initially, 28 public meetings were held throughout the state. The results of the meetings were analyzed and tentative goals were drafted. Another series of meetings took the goals back to the public for comment and revision. In addition, a state Citizen Involvement Advisory Committee representing a very broad range of interests has been established. Public participation at the local level is encouraged by requiring counties to submit a citizen involvement plan to the LCDC for review.

Commission coordination of state and local planning efforts is to be accomplished

through two means. Local government units must adopt and submit land use plans to a regional coordinating body for review. The regional body may consist of the county, a voter-approved regional planning agency, an association of counties, or a voluntary association of governments. The regional body will review the plans for conformity with the statewide goals adopted by the LCDC. Any local government not in conformance has one year to revise its plan. After one year the LCDC may grant an extension of time, if progress is being made, or the commission may prepare and administer a plan for that locality until the local government prepares one consistent with the statewide goals. The cost to the LCDC of preparing a plan for a locality is borne by the local government.

State agency planning activities and actions that affect land use are directed by SB 100 to conform with the statewide goals and guidelines adopted by the LCDC, and the commission is directed to coordinate state agency planning to insure conformance. However, at this time, the coordinating role appears to be through permit authority for activities of statewide significance rather than direct involvement in the planning process of other state agencies. The bill authorizes the LCDC to issue and enforce permits for designated activities of statewide significance such as the planning and siting of public transportation facilities, public sewage, solid waste, and water supply facilities, and public schools. The commission also may suggest to the legislature additional categories of activities that should require permits.

Senate Bill 100 also directs the commission to hear appeals by state agencies, regional coordinating bodies, counties, cities, special districts, and groups and individuals affected by any plan, provision or ordinance which they feel is out of conformance with the statewide goals. A city or county may appeal a decision of the Department of Land Conservation and Development to the LCDC.

Senate Bill 100 also created the joint legislative committee on land use, to which the LCDC reports monthly and which acts as the commission's liaison with

the legislature. The joint committee was charged with investigating and presenting recommendations to the 1975 legislature for methods to compensate landowners adversely affected by land use regulation.

Among the many innovative ideas incorporated into the other land use legislation passed by the 1973 Oregon legislature was a change in taxation of farmland that provides for an exclusive farm use (EFU) zone, automatically assessed at its value for farming rather than for any other use. Farms outside the EFU zone may apply for a similar tax assessment. When land use is changed in areas receiving this special assessment, a penalty is paid up to 10 times the previous year's taxes, or the difference between what was paid and what could have been assessed, depending on whether the land is inside or outside of an EFU zone, respectively.

Senate Bill 487 requires local ordinances and regulations to comply with adopted comprehensive plans. House Bill 2548, pertaining to county planning commissions, and House Bill 2965, pertaining to city planning commissions, provide that not more than two commissioners may be engaged in the buying, selling or developing of real estate or engaged in the same kind of profession, business, or trade. Conflict of interest standards also are established for the commission members. Permits issued by the commissions must comply with the adopted comprehensive plan.

House Bill 2086 permits a local governing body to review substantially undeveloped subdivisions or portions of subdivisions which do not conform with current subdivision standards. The local governing body may require revision of the subdivision plat or it may vacate the plat if it cannot be revised to conform with current standards.

EFFECTS, PROBLEMS AND LESSONS

Long term effects of Oregon's effort to regulate land use cannot be foretold.

The legislative battles over the bills and the ensuing programs for public involvement have produced an unprecedented public awareness of land use issues. The hearings held throughout the state by the LCDC to formulate statewide goals and the meetings to take the draft goals back to the people can only lead to a general acceptance of the responsibility and obligation to direct the future of the state through the regulation of the use of land. Oregon is perhaps the first state in the nation to establish an institutionalized process to define statewide goals and guidelines on land use.

The Oregon experience also demonstrates the need for patience. Change requires time and efforts on many fronts, and moreover, it requires leadership. In Oregon the passage of strong land use legislation required the efforts of several senators and the unceasing support of the executive branch and Governor Thomas McCall (55).

In a recent interview, Governor McCall refuted the assertion that Oregon's land use laws are part of a no growth policy. He called it instead a "wise growth policy," one that produces enough jobs to take care of mild in-migration and Oregon's own young people. Years earlier he had argued that a little belt-tightening then would give Oregon the ability to pick and choose in the future--that is, now.

> Now we Oregonians are at the point where we can look at some tremendously good firms and maybe we can let a limited number into the state.... We are in a position to pick. We can go down to Los Angeles and say, 'If you want to become a member of our club we'd like to have you, but we don't like rattle and bang and smoke and dirt...' That's our whole philosophy. Instead of panting madly. (55)

Colorado

Many Coloradans are beginning to wonder what has happened to the Colorado that attracted them. Since 1950 the state's population has almost doubled to two and a quarter million persons, 80 percent living along the Front Range of the

Rockies. Almost 90 percent of the Front Range is urbanized (56).

Denver, once a compact, attractive city known for its clean air and magnificent view of the mountains, today can be easily mistaken for Los Angeles: sprawling for as far as the eye can see, or lost in a blanket of smog. The future may hold an even more ignominious fate for the once fair city--being an indistinct blur in the center of a single urban megalopolis stretching from Fort Collins in the north to Pueblo in the south.

The Colorado Land Use Commission was established by the 1970 Colorado legislature to "guide the growth and settlement of the State and assure the best and wisest use of the State's land now and in the future." (56) At the commission's request the 1971 legislature increased from seven to nine the number of commission members and altered the mandate of the commission from the preparation of a statewide zoning map to the preparation of a state planning program involving all levels of government. The commission also was given temporary emergency power to issue cease and desist orders, with the approval of the governor, and to stop development activities constituting a significant danger to health, safety or welfare. The land use planning program report, A Land Use Program for Colorado, was delivered at the end of 1973.

The land use report represents three years of work and more than $1.5 million in research. The report identifies four areas of issues inseparable from the land use question: environment, economics and population, natural resources, and social concerns. Based on hearings and meetings with interest groups throughout the state the commission recommended goals in the four areas and a land use program to achieve the goals.

The commission asserts that there are really five Colorados, that is, five distinct regions, often with characteristics and problems having more in common with similar regions in adjoining states than with the rest of Colorado. The commission recommended programs for achieving goals in each of the broad areas

for each region as well as for the state as a whole.

The report also lays out the legislation, organizational mechanisms, and actions needed over a five-year period to institute the land use program. Major premises of the programs are that land use decisions should be made at the lowest level of government that has the staff and budget capacity to carry them out (generally local and regional government) and that the program should focus on "enhancing the quality of life, not just on restraining the quantity of growth." (56)

The commission called for the establishment of a land use agency at the state level responsible for overseeing the entire land use program. Specific functions would include the designation of critical areas and activities of state concern and establishing and enforcing a development permit system for both. The state agency also would provide technical assistance to regions and local governments and set development standards. Within the agency there would be a permit review board to hear appeals on decisions regarding permits for activities of state concern or developments within critical areas.

Also at the state level there would be established a special land agency, constituted as a state-owned public corporation, to acquire land for specified public purposes including: protection of critical areas, providing recreational opportunity, control over highway-related commercial development, and public access to existing public lands. The agency powers also would be used to guide development by assembling areas currently under fragmented ownership and selling them to developers after attaching covenents sufficient to insure quality development. Such an approach is one of the few constructive alternatives available to government when a developer does not own the land most suited for his proposed development.

Within each of the five regions identified by the land use commission the

report suggests establishing a regional planning office staffed by personnel from the state land use agency and other state departments. The regional offices are to act as communication and coordination channels between the state and local governments and to administer the development permit system for critical areas and activities of state concern. In addition the regions would provide technical assistance to local governments, coordinate federally required (A-95) project reviews, and prepare regional plans in cooperation with the state and local governments.

The recommendations of the commission would leave the responsibilities and prerogatives of local government largely unaffected; only when development had significant regional impact would the traditional authority of local governments be disturbed.

Many of the concepts contained in the report of the Colorado Land Use Commission were introduced as bills in the 1974 Colorado legislature. Out of legislative compromise arose House Bill 1041, weak beyond anything imagined by the commission or its staff, but acceptable to almost everyone.

House Bill 1041 declares that "the protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of the public interest," and encourages local governments to designate and administer critical areas and activities of state interest pursuant to guidelines tendered in the act.

HOW IT WORKS

The land use program outlined in the bill is completely voluntary. The legislature appropriated slightly over $2 million for the Department of Local Affairs (includes Division of Planning) to be distributed equally among those of Colorado's 23 counties that desire to participate in the designation program. Of the appropriation, $500,000 is to be retained by the department to assist local governments.

Critical areas may be designated by local governments from among mineral resource and natural hazard areas; areas containing or having a significant impact on historical, natural, or archaeological resources of statewide importance; and areas around key facilities when development in such areas may affect the facility or the surrounding community.

The definitions of mineral resources and natural hazards are quite broad, although the former explicity excludes geothermal resources. The administration of natural hazard areas is to be consistent with guidelines prepared by state agencies having expertise in relevant areas, such as the Water Conservation Board, Soil Conservation Board, State Forest Service, and the State Geological Survey.

Historical, natural, and archaeological resources are identified and administered by the state historical society or department of natural resources acting in conjuction with the appropriate local government.

Key facilities are defined as airports, major facilities of a public utility, interchanges of arterial highways, and mass transit terminals, stations, and fixed guideways. The law outlines in some detail how areas around such facilities are to be administered.

The bill allows local government to designate any of the following as activities of state interest: siting of new or additional water and sewer facilities, solid waste disposal facilities, airports, mass transit systems, highways, and public utilities; development of new communities; water projects; and nuclear detonations. Criteria for the administration of activities of state interest are outlined in the act.

Local governments are required to report their progress in implementing H.B. 1041 to the Land Use Commission six months after the passage of the act. The commission is to report to the legislature. Local governments also are required to submit to the commission, upon designation of a critical area or an activity of state interest, copies of the designation order and adopted administrative

regulations. The commission must review the order and regulations and may recommend modifications to insure compliance with the act and with state guidelines. The local government is left the option, however, of complying with the recommendations of the commission, or rejecting them. Local governments are explicitly allowed by the act to adopt regulations more stringent than those outlined in H.B. 1041.

The Land Use Commission may request a local government to designate an area or activity within its jurisdiction and the local government must hold a designation hearing and issue a decision. If the local government fails to designate, or after designation fails to promulgate regulations, the commission may seek judicial review of its original request.

The act provides interim controls by requiring a moratorium on development in a designated critical area or a discontinuance of a designated activity of state interest from the time of designation until final adoption of development guidelines. If the Land Use Commission has taken a locality to court no development is permitted during the time the court is reviewing the case.

Once a local government has designated critical areas or activities of state interest then development within those areas or including those activities requires a special permit from that local government. A standard permit application form is provided by the commission for use throughout the state. The local government having jurisdiction over the development site is required to hold a hearing (the cost of which may be charged to the developer as part of a filing fee) and prepare a written decision based on its findings. Approval or denial of a permit is based on the local government's regulations, and the decision is subject to judicial review under the standards for the review of any other local government activity.

EFFECTS, PROBLEMS AND LESSONS

House Bill 1041 has not been law long enough for knowledgeable discussion of its effects. The bill is, however, vague in numerous areas and leaves much to the interpretation of the administering agencies and the courts.

Obvious problems include a lack of standards for judicial review, a lack of guidelines for the required cooperation between local government and state agencies, and a lack of procedure for resolving conflicting decisions by counties on projects that cross county lines.

House Bill 1041 is the watered down version of what was once a strong land use bill. However, powerful legislators made it clear during the session that this bill offered local governments the opportunity to act voluntarily; if they failed to take advantage of the opportunity the legislature would enact mandatory legislation and give the state a much stronger role.

THE AMERICAN LAW INSTITUTE MODEL LAND DEVELOPMENT CODE

History

The scope and role of land use planning has changed greatly since the 1920s, yet the enabling legislation on which land use planning and decision making is based has changed little. Two model acts, the Standard State Zoning Enabling Act (SZEA) and Standard City Planning Enabling Act (SPEA), are the basis for zoning and planning enabling legislation in most of the 50 states, Montana included. The acts were prepared by the U.S. Department of Commerce; SZEA in 1922, SPEA in 1928 (57). These acts hardly can be applied to today's land use issues, let alone tomorrow's.

Since 1963 the American Law Institute (ALI), a highly respected professional organization well-known for legal research, model codes, laws and ordinances, and continuing legal education, has been preparing a Model Land Development Code

which it intends to present as an alternative to SZEA and SPEA. Successive drafts of the code have been reviewed by the full ALI membership and a wide spectrum of other interested parties. The first official draft, covering six of the proposed 12 articles of the code, was approved by the full membership in May. The model code attempts to solve the basic weaknesses of SZEA and SPEA that have been pointed out repeatedly in major studies during the last 10 years.

Status Quo

State statutes modeled after SZEA and SPEA authorize local government involvement in land use decisions only to prohibit undesirable development. The ability to encourage desirable development, an essential planning tool, is absent. A dominant orientation toward short-term local interest has made attack on regional problems very difficult, if not impossible, and the lack of a specified procedure for making decisions has resulted in administrative processes contrary to accepted concepts of fairness and orderly procedure. From SZEA and SPEA comes the concept of the static comprehensive master plan, a map purporting to represent the desired distribution of land uses in an area at some future date. Yet neither SZEA nor SPEA attaches any legal significance to master plans, so it is unreasonable to expect the plans to be successful at guiding land development. In any event, the forces of growth, the shifts in the land market, the changes in peoples' expectations, and the inability to forecast the future with accuracy would seem to doom such a rigid approach to failure.

Premises

The basic premise of the ALI model code is that the great majority of government decisions regarding land use should be made at the local government level, but local government needs new machinery to handle today's land use issues. The decision making process proposed by the code would require explicit analysis and

disclosure of social, economic and environmental consequences of decisions. The code hopes to reduce the impact of politics in decisions regarding the use of private land and substitute professional analysis based on general standards established by the state legislature. Under existing law local government officials need not justify their decisions to anyone and are under no obligation to explain the basis of their position concerning proposed development.

Moreover, the code asserts that there is a legitimate state interest in development that occurs in certain areas and in specified types of development that have social, economic, and environmental impacts beyond the boundaries of the local government. But even in these cases, the local government would retain review and enforcement powers. However, the code would require local government to act pursuant to state policies, and subject local decisions to appeal to a state board. Maintaining review authority at the local level, even with regard to the legitimate interests of the state, would reduce duplication of permits and hearings and would not introduce additional costs and time delays in the land development process.

The code also would recognize and clarify the interests of individual citizens, citizen groups, and other units of governments in local land use decisions and, very significantly, would make state and local government development projects subject to the same regulations as private developments.

The most pervasive feature of the code is its insistence on administrative and adjudicatory uniformity. Regardless of the policy chosen by local government, under the code all action would be in accordance with a statutory process identical, within a narrow range, to the process used by all other local governments within the state.

Local general purpose governments could choose to adopt a land development ordinance as modeled in the code and designate a Land Development Agency (LDA) under the ordinance. The land development ordinance would consolidate and reorganize the administration of zoning and subdivision law and the land development agency would replace planning boards, zoning boards of appeal and other similar functions. The local governing body could designate itself, or any committee, commission, board or officer of the local government as the LDA, but the agency would have to have final authority and responsibility for any decisions made within its jurisdiction under the land development ordinance. Part of the intent of the code is to reduce the number of agencies from which a developer would have to receive permission to proceed.

Although the code would leave to local discretion the organization of the LDA, it stipulates in great detail the disclosure and hearing procedures to be followed by the agency. Within the hearing and disclosure requirements lie the protections offered the developer and the general public from arbitrary and purely political decision making.

The local governing body also could designate any agency, committee, commission, department, or person to prepare a local land development plan, and under the code, such a plan would be adopted by the local government and vested with legal significance. Plans would have to be based on a number of studies specified in the code and include an analysis of the probable economic and social consequences of adoption. The long range plan would have to be revised every five years, and include a short-term program of specific actions to achieve some facet of the long-range plan.

Adopted local land development plans would have to be submitted to the state for review and comment and checked for consistency with the state land development

plan if there were one. To induce local governments to prepare and adopt plans the code would reserve to those governments with adopted plans certain additional powers that would allow the local government wider flexibility in responding to and guiding development.

The code also would restructure the ability of local government to acquire and dispose of land in the furtherance of the development objectives of the community. One objective would be to assist large scale developers in amassing land for their projects. Land could be acquired by a variety of means including purchase, gift, interagency transfer, exchange, and eminent domain but most of this section of the code is devoted to procedures for disposing of land. Most existing law is very weak in this area. The code provides for flexible disposal to insure that the land would be used for the intended purpose while providing protection for the public interest.

At the state level the code proposes a State Land Planning Agency (SLPA) as part of a broad state planning agency in the governor's office. Although the code does not encompass social and economic planning, the drafters assumed that there exist state social and economic planning functions that could be combined with land planning in a single agency.

The SLPA would be directed to assist local governments, perform an informational role by preparing and distributing a weekly monitor of development activity in the state, appoint local land development agencies in specified circumstances when a local government fails to, maintain a register of permits required by land developers and, upon the request of a developer, organize and preside over multi-permit hearings. A multi-permit hearing would enable a developer to respond to all permit granting agencies at a single hearing.

The SLPA could prepare a state land development plan for all or part of the state. Such a plan would have to consider adopted local land development plans and the plans of other state agencies. The code specifically states that local governments having a plan would be encouraged by the state plan to pursue their

development policies to the maximum extent feasible consistent with the general welfare of the people of the state. Like the local plan, the state land development plan would have to include a short-term program to achieve some facet of the long-range plan. If the program were not implemented the plan would become void.

To obtain legal significance the state plan would have to be adopted formally. The code suggests several alternatives: 1) approval by the governor and transmittal by him to the legislature with automatic enactment after failure of either house to pass a resolution of disapproval within a specified time period, 2) by the governor using his executive power, and 3) by the legislature in accordance with the procedures for the enactment of general legislation.

The code also identifies two categories of development, areas of critical state concern and developments of regional impact, where state and local conflict would likely occur over land use policy and proposes a procedure for conflict resolution on a case-by-case basis. When reviewing developments of regional impact or any development proposed in a designated area of critical state concern the local development agency would have to rule pursuant to state standards and guidelines.

Areas of Critical State Concern (ACSC) would be defined based on the characteristics of spatially delineated areas. The state land planning agency would designate ACSCs by rule after holding a hearing and publishing the reasons for designation, the dangers and loss if not designated, the advantages of designation, and general guidelines for development of the area. An Area of Critical State Concern could be designated only for four types of areas:

1. Areas significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

2. Areas containing or having significant impact upon historical, natural or environmental resources of regional or statewide importance.

3. A proposed site of a new community designated in a state land development plan, together with a reasonable amount of surrounding land.

4. Any land not covered by a development ordinance within a specified number of years after the effective date of the code.

After designation, the local land development agency, or agencies, having jurisdiction over the area would be given a specified time to prepare and adopt regulations for the ACSC. The state land planning agency would review the regulations for compliance with the state guidelines. If the local regulations were found to be inadequate or were not prepared, the state agency would prepare and adopt them until adequate local regulations were adopted. However, even in this instance the initial decision on a development permit still would be made by the local land development agency.

The code provides for interim controls for Areas of Critical State Concern from initial notice of intent to designate, to the time of adoption of regulations. It also provides for the failure of a local governing body to adopt a land development ordinance or appoint a land development agency.

Developments of Regional Impact (DRI) would be defined by type or size of development based on the impact such development would have on its surroundings regardless of its location. The definition of a DRI, however, could vary among areas of the state to reflect local differences.

The state planning agency would designate categories of development as developments of regional impact based on consideration of air, water and noise pollution, traffic generation, forecasted population change, size of site, associated development and so on. The code attempts to insure that the DRI process would be limited to appropriate type anu size developments to avoid developments of purely local impact. Categories of DRIs also would include a designation of development of regional benefit, available upon the request of any developer upon meeting criteria stipulated in the code. Developments of regional benefit would

include projects of governmental, educational and charitable institutions, public utilities and housing developments for persons of low or moderate income.

When considering a proposed DRI the local land development agency would base its review on the standards in its own local development ordinance applied to the region affected by the DRI and would have to balance detriments against benefits in a manner stipulated in the code. The state land planning agency could submit a report presenting the state's position on any DRI, and would have to submit such a report when requested by a local land development agency. The local land development agency would have to set forth in writing its findings and decision regarding each DRI.

The code also proposes a state land adjudicatory board to hear appeals of the decisions of local land development agencies. The board would be entirely separate from state planning and would comprise five members appointed by the governor or by the state's highest court. Standing to appeal would be granted all those who could appeal in court and the code provides for the delay of judicial proceedings until action could be taken by the board. The board would accept primarily written submissions and perform a purely appellate function. If additional evidence were needed the board would remand the question to the local land development agency. It is not intended that the board develop the administrative machinery needed to hold hearings and take evidence. The board would have to present its findings and decision in writing.

The state land planning agency could establish divisions of itself as regional planning agencies throughout the state. The agency would have to respond to the request of a number of local governments or the petition of a stipulated percentage of the included population to create a regional planning agency or change the boundary of an existing region. The drafters of the code feel that the present system of voluntary regions or councils of government is inherently ineffective (58,59).

A regional division of the state planning agency would act as a communication channel between the local and state government, provide assistance to local government, could prepare regional land development plans, and could exercise all the other powers of the state planning agency.

Under the code long-range state planning would be carried on by a planning institute associated with the state university or organized as an independent entity within the state planning agency. Long-range planning would be isolated from immediate pressures and crisis intervention.

The code also has statutory language providing for procedures to enforce land development regulations, for public records of the regulations and for judicial review of orders, rules and ordinances. In addition the code proposes model legislation for establishing a state land bank. Land banking is a system by which a government entity acquires land to control an area's future growth.

COMMENTS ON THE CODE

During the more than 11 years of work on the code, five tentative drafts have been released for review and comment. Included in each draft has been a commentary by the writers explaining the choices they made and discussing alternatives. Much of the criticism of the code has concerned its scope. Questioning has led to changes in the code. However, some questions have endured through all the drafts and are included in the commentary on the official draft.

Many reviewers who see a need for a strong state role in land use decisions have questioned the likelihood that local people responsible to local government will administer state policy without an unacceptable local bias. The drafters respond that tight procedural requirements, the requirement for written findings and a decision after a formal hearing, and the availability of an appeal to a state level board insure an adequate record on which to decide if statewide concerns justify overriding local interests. On the other hand, the system insures that those wishing

to override local decision makers must demonstrate that a compelling state interest is at stake.

Local people have obvious advantages in making land use decisions based on their familiarity with the land and the conditions of the community. The drafters also argue that establishing state machinery to hold hearings and make initial decisions would be costly, duplicative and unlikely to account for subtle local problems. (Past practices of highway location are said to be an example of a state level action that has lacked local approval and participation and has resulted in unfortunate alignments and unnecessary intergovernmental friction.) Parallel administrative systems could encourage the filing of development applications with the agency most likely to give a favorable result, or lead to confusion in project jurisdiction.

Reviewers of the land development code also ask whether the preparation and adoption of a plan should be mandatory. The code leaves the plan to the discretion of both the local and state governments, and tries to induce local governments to prepare plans by granting additional powers to those who do so. However, many reviewers think the inducements are inadequate and present several arguments to support their contention: 1. Local governments preferring unencumbered power to bargain with developers would be frightened by the idea of a plan and the limit it might impose on their discretion; 2. The powers that would be denied to non-planning governments are precisely those all governments should be encouraged to exercise (59,60,61). An alternative incentive could be the granting of the complete range of powers to all governments with the stipulation that actions of planning governments would be presumed constitutional by courts until proved arbitrary, while non-planning governments would have to prove reasonableness (60).

Others who favor mandatory planning have argued that land resource values are particularly vulnerable in areas where current residents are not yet conscious of the disadvantages of suburban sprawl or second home development and so will not

see the need for land use regulations until the damage is done.

The drafters acknowledge these arguments and counter with several of their own. If the code and law based on the code were to state that local governments "shall" prepare and adopt plans, local governments that failed to plan could be taken to court. The drafters contend that it is difficult to imagine a court directing a board of county commissioners to prepare a plan.

The drafters also argue that for many small jurisdictions it is impossible to find and employ competent planners, and that in static or declining areas mandatory planning would simply be make-work. Regarding land resource values, the code establishes procedures allowing the state to exercise regulatory authority over areas and categories of development that present current problems. Otherwise, it is argued, the state should not casually interfere with the prerogatives of local government.

Conclusion

The American Law Institute's Model Land Development Code proposes that each state establish a new framework for making land use decisions by consolidating zoning and subdivision law, and requiring administrative and adjudicatory uniformity and accountability at the local government level; and by acknowledging a state interest in certain land use decisions and establishing a procedure for state intervention in those decisions.

It should be noted that Florida's Environmental Land and Water Management Act (discussed above) implements in a slightly modified form the parts of the code dealing with Areas of Critical State Concern and Developments of Regional Impact.

III. A LAND USE POLICY FOR MONTANA'S FUTURE

ACCOMMODATING CHANGE WHILE PRESERVING OUR VALUES

Strong state and national pressures will force Montana to change. Growth is but one wave of an inevitable storm of changes that will buffet Montana in the course of evolving times, fashion and human affairs. The question is not "shall" we grow, but "how." In the minds of many, the "how"--the quality and opportunities of the future--will be determined in great measure by the uses to which we put our land; by the type and arrangement of man's activities over the face of the state.

Today, decisions significantly influencing the use of land in Montana are made in a fragmented, uncoordinated manner by 182 local governments, 19 state departments and assorted independent agencies, at least 18 federal agencies, seven Indian reservations and by about 700,000 residents and an undetermined number of non-residents. The system guiding these decisions is the same system that gave Los Angeles to California and Denver to Colorado. If history is any guide to the future, it is unlikely that this system will treat Montana any better. Are the specters of the past part of the future Montanans want for themselves and their children? The available evidence seems to indicate they are not.

A change in the land use decision making process clearly is called for, but the direction of that change is the subject of heated debate and controversy. There is, however, no debate over where the responsibility for change lies; it lies with state government. The power to regulate the use of land was not included among those powers constitutionally granted to the national government by the 10th Amendment, and thus is presumed to be a

power reserved to the states. Most states have allowed this power to lie idle or have delegated it to local government. During the last five years, however, there has been a growing movement among states to recapture and exercise the power to regulate land use.

Local government has proved to be too easily dominated by special interests and too dependent on local taxes to consider the long-term and wide-ranging effects of land use decisions. What increases the tax base today is all too often desired regardless of the price that might have to be paid tomorrow. In addition, the ability of local governments to make decisions affecting significantly the lives of persons living outside their jurisdictions defies a basic tenet of our form of government. Representative democracy requires that officials govern only those that they represent.

The time has come for Montana to put its house in order, to lend rationality and accountability to its land use decision making processes. Montanans must prepare themselves to accommodate and guide growth and change while preserving the economic base that will sustain the state over the long term and preserve the values which make Montana the unique and desirable place it is.

The Legal Basis for State Action

The authority of government to regulate the use of land legally derives from the inherent police power of government--its authority to exercise reasonable control over persons and property in the interest of public security, health, safety, morals and welfare. Although the American ethos of land ownership holds that society will be served best if each landowner has unbridled freedom to do as he pleases with his land, our law has long

recognized that landowners' rights are subject to limitation through the police power.

As early as 1631 the colonists had enacted laws regulating the use of land. Overzealous planting of valuable and exportable crops, such as tobacco, was occurring at the expense of the community's food supply. In 1631 the Virginia House of Burgesses passed an act requiring each white adult male to grow two acres of corn, or forfeit an entire tobacco crop as penalty. In 1692 Boston enacted an ordinance similar to a present day zoning ordinance confining the location of slaughter houses, stills and other odoriferous uses to areas where they would least offend local citizens (62).

The exercise of the police power is limited by provisions of both the Montana and U. S. Constitutions. Article II, Sec. 17 of the Montana Constitution declares that "No person shall be deprived of life, liberty, or property without due process of law." Similarly, the 14th Amendment to the U. S. Constitution declares that "No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Moreover, the U. S. Supreme Court has held that the wording of the 14th Amendment makes the "compensation clause" of the 5th Amendment applicable to the states. The compensation clause declares that private property must not "be taken for public use without just compensation."

Because of the limitations on its use, the police power is now commonly defined as the inherent power of government to regulate human conduct, without a taking of property, in order to protect health, safety, morals, or the general welfare. An early decision of the Montana Supreme Court

supplies an excellent discussion of the police power:

> The police power is broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society.... Under it the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other. All property is held under the general police power of the state to so regulate and control its use in a proper case as to secure the general safety and the public welfare (City of Helena v. Kent, 32 Mont. 279, 80 P. 258 (1905).

Laws enacted or actions taken in the exercise of the police power also must be reasonable, not arbitrary, and must be beneficial to the community as a whole. Many court actions challenging police power regulation of land hinge on the meaning of "reasonable" and on the question of what constitutes a taking of land.

The Montana Supreme Court has addressed these issues and provided some guidelines for judicial resolution of such actions:

> In gauging the reasonableness of the statute in question, we must not look back solely to past precedents, but must also look ahead. In short, the police power as such is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power (Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P. 2d. 182 (1964).

In the case cited immediately above, the court held that the statutory requirement for park dedication prior to subdivision plat approval (Sec. 11-602, R.C.M., 1947) was constitutional. The plaintiff had argued that this requirement was really an unconstitutional exercise of the power of eminent domain without compensation rather than an exercise of the police power. The court explained that if a subdivision creates a specific public

need for parks and playgrounds it is not unreasonable to place on the subdivider the burden of providing them.

The question of when regulation of private property becomes a "taking" that requires compensation is a continuing legal debate. The arguments are presented in judicial opinions, in law review articles and in studies such as The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control. For most of this century the criterion used in resolving this question was one of balancing the public purpose served against the reduction in value of the land regulated, provided that the land was not rendered worthless.

The legal definitions of "reasonable" and of "taking" change with society's changing needs and wants. The authors of The Taking Issue analyzed federal Appellate Court decisions in which the taking issue was discussed and were able to see evidence that a "quiet revolution in judicial attitudes" concerning the right of government to regulate land use had occurred after 1970. The change in judicial awareness certainly was not spontaneous--1970 also marked significant changes in social and political awareness of environmental concerns.

During the last 50 years, the Montana legislature has enacted measures designed to regulate the use of land to benefit the public health and welfare. Recent examples are the Montana Subdivision and Platting Act; the act providing for the review of sanitation and water supply in subdivisions; and the act providing for the regulation of land in the floodplains of rivers. (These laws are discussed in the state agency review earlier in this study.)

The authority of government to regulate land use has been tested in the Montana courts in cases centered on the delegation of zoning powers to local

governments. In one of the earliest zoning cases, the court found that the authority of incorporated cities to enact zoning ordinances, so long as the ordinances have a "real and substantial bearing upon the public health, safety, morals, and general welfare of the community," is constitutional (Freeman v. Board of Adjustment, 97 Mont. 342, 34 P. 2d. 534 (1934)).

During the 1960s two additional Supreme Court cases addressed the constitutionality of Montana's zoning laws. In the first case the court held that, while zoning itself was a legitimate exercise of the police power, the manner in which this power had been delegated to counties was unconstitutional. The court said too much discretion had been granted to planning boards, and legislative power had been unconstitutionally delegated to counties (Plath v. Hi-Ball Contractors, 139 Mont. 263, 362 P. 2d. 1021 (1961). The law was repealed and replaced. The 1972 Constitution now allows granting of legislative powers to counties). In a companion case, the court held that the grant of zoning power to counties made under a different law was constitutional in that the law set out guidelines sufficient to insure that county commissioners were acting in an administrative rather than legislative capacity (City of Missoula v. Missoula County, 139 Mont. 256, 362 P.2d. 539 (1961)).

The Montana Supreme Court has found that the state has the authority to regulate the use of land for certain purposes and that the scope of those purposes necessarily changes over time. So in these times of increased awareness and concern over the impact of land use decisions on the public health and welfare, it seems evident that the court would find properly executed state action to regulate the use of land both reasonable and permissible.

The Growth Question

Inevitably linked to any discussion of land use is the question of growth, for feeding growth always has required large scale changes in the use and ownership of land. A thorough discussion of growth and Montana's future is beyond the scope of this work (this study recommends that a commission be established to study the topic), but a discussion of land use would be incomplete without exploring the basic positions and arguments that surround the growth issue.

Growth, change and novelty long have been viewed by Americans with fascination and hope. Change meant more of everything for everyone. But times have changed, and so have some old assumptions. Certainly, there are many Montanans who no longer believe that more is always better and that growth is a panacea for economic and social ills.

The argument over growth is bounded on two extremes: by those favoring the maximum exploitation of the state's resources at the quickest possible rate, and by those favoring a return to prehistoric conditions, or at least to the good old days. Unfortunately, the good old days are much better in retrospect than they were in reality. Obviously, neither extreme would be acceptable to the great majority of Montanans, nor is either likely to occur.

Realistic bounds on the state's options are illuminated by the contrasting arguments on the role of the market in land use decisions. Some believe that the market provides the best regulation of land use because the "highest and best use" of land is defined as the use for which someone is willing to pay the most money. Others argue that the market does not and cannot work in the real world as it does in theory and that, in any event, the market,

as presently constituted, is incapable of considering costs to future generations, degradation of environmental health and intangible and subtle social effects.

Accepted economic theory says that a competitive market must satisfy two primary conditions to operate efficiently. The first condition requires that there be sufficient buyers and sellers so that no one individual can cause a change in prices by increasing or decreasing the supply of a commodity. The second requires that all buyers and sellers have complete knowledge of the quality and prices of available goods and services. Rarely is either condition satisfied in any market. The land market is no exception.

Parcels of land in a given geographical area are unique with respect to a number variables: water availability, soil type, scenic quality, distance to market and jobs, vegetation, neighborhood attractiveness, and so on. This uniqueness, or lack of substitutability among parcels, limits the availability of each particular kind of land.

Land buyers also are unique. Each has different preferences with respect to the characteristics of land. Since there may be only a handful of parcels meeting a buyer's needs available at a particular time, sellers often may be able to determine local land values. A market characterized by a lack of substitutability among products, few sellers, and many buyers is not competitive.

It is also practically impossible for land buyers to have complete knowledge of the quality and price of all land on the local market. Many land owners may not list their property for sale among real estate agencies although they might sell if asked. Agencies may not know about or choose to deal in certain kinds of land even though a likely buyer is at hand. In other words, competition suffers when buyers and sellers cannot communicate.

In addition, the value of a parcel of land is linked closely to the use and value of surrounding land. Likewise, the value of the surrounding land is dependent on the use and value of that parcel. This interdependency of land values interferes with the ability of a competitive market to assign prices efficiently. The proper functioning of markets requires that the value of a person's property be neither benefitted nor decreased by the economic decisions of others. We are all well aware that this is not the case with regard to land.

One landowner's decision to subdivide and develop a trailer court, for example, affects the market value of his neighbor's property. A homeowner's decision to make a duplex out of his house and rent apartments may lower the value of his neighbor's property. These uncompensated damages, or in some cases benefits, are known as externalities. Externalities are the effects of a decision which are not included in calculating the costs or benefits of that decision.

Market decisions are motivated by individual self-interest and the desire to maximize profit. This can easily exclude consideration of long-term public interest. Irreversible commitment of land may involve substantial future costs to society. The subdivision of prime farm and ranch land is but one example. Such division is rarely reversed and then only at great cost. Who will pay if today's decisions are wrong? Today's market does not represent future generations, even though they must pay the price of today's mistakes.

Those who argue against the market's ability to allocate land also contend that the use of land must be perceived in relation to biological processes and a humble philosophic conception of man's place in the universe. Only if the world's natural processes continue to function in health and diversity will human society continue to develop. Hence, the slow- and no-growth

advocates are attempting to protect complex processes they see as vital to the survival of civilization.

Another aspect of the growth issue characterized by sharply contrasting positions concerns the question of jobs, job diversity and the migration of the state's youth.

One side argues that Montana needs growth to provide more employment or more secure employment. During the 1950s and 1960s increases in jobs lagged behind growth in Montana's labor force. Many Montanans had to leave the state to seek opportunity and a livelihood. Even though jobs are being created more rapidly today than in the previous two decades, the state unemployment rate remains above the national average and the job market lacks diversity. The necessary diversity can come only if Montana eases its historical dependence on mining, agriculture, forestry and tourism. Of course these basic industries are crucial to Montana's future, but to satisfy an increasingly urban population wider occupational choice is needed.

Others who think about jobs and diversity wonder what toll a policy of headlong expansion of occupational choice would extract from the Montana way of life. Often cited is the facetious comment of a Colstrip rancher who pointed out that he did not feel compelled to create social problems in Rosebud County to provide employment for his son, a recently graduated sociologist (63). It is possible to have growth in limited areas of the economy; growth in service jobs, in jobs that require inventiveness and creativity and growth in jobs that consume a minimum of energy, natural resources and land.

Also questioned are the reasons cited for migration of the state's youth. There have been few studies of this question and the most recent declares that:

> For the young, migration is seen as an expression of freedom and an opportunity to experience and consider life style alternatives.... Therefore, it may be unrealistic to assume that local employment opportunities or other attractions will induce young people to remain near home. It is apparent in Upper Midwest communities that expanding employment opportunities tend to attract new people, rather than keep the young at home (64).

The following sections of the study outline and recommend a land use policy and a land use decision making process for Montana. But a land use policy is only one tool of a growth policy. Somewhere between the extremes, the citizens of Montana must isolate a growth policy that will provide long term goals and priorities for government decision makers, including those who will be making decisions about the use of land.

A PROGRAM AND A POLICY FOR MONTANA

Something must be done if Montana is not be become another "Anyplace, U.S.A." State government has the authority and, many would argue, the responsibility to take action. But what should the role of state government be?

Earlier, this study discusses the efforts of other states to restructure their land use decision making process. There is much to learn from such examples, but each state is unique and each must chart its own course. What is desirable in Georgia may be ridiculous in Nebraska, and what is radical and controversial in California may be old hat in Wyoming.

The Montana legislature has found that there are specific categories of resource systems and development impacts that are so wide ranging or of such importance that they must be regulated at the state level. Certainly

the legislature will and must continue to identify similar systems and act to protect the public welfare. However, the traditions of this state and many theories of governmental structure do not favor an ever increasing state role in decision making.

For example, a system of statewide zoning (as done in Hawaii) has been mentioned from time to time as a solution to the land use problems of Montana. Such a suggestion ignores the vast cultural and traditional differences between the two states as well as the sheer difference in size. The practical problems of such a scheme are overwhelming.

How many man-hours would it require for an agency in Helena to develop what is essentially a zoning map for every county in the state, and then resolve all the disputes that are sure to arise over boundary line changes and other decisions? What public relations problems will result when a citizen of Baker realizes he must come to Helena for a seemingly minor decision?

Moreover, the Environmental Quality Council thinks it is undesirable to centralize all land use control at the state level. It finds that such a scheme would contradict Montana's strong local government tradition.

Three assumptions, therefore, underlie the recommendations presented in this study:

1. Governing should be done by that level of government which is the closest to the people yet capable of performing the desired function. In Montana, for most land-use issues, local government can meet this requirement.

2. There are land use issues in which the people of the state in general have sufficient interest to override occasionally the narrow interests of a locality.

3. Actions of government agencies should be subject to the same scrutiny and regulation as the actions of private individuals and organizations.

Adhering to these assumptions, a system of land use decision making is proposed which would allow Montanans to take control of their future without unnecessarily disrupting the traditions of the state or interfering with the legitimate expectations of its citizens.

Based on the three assumptions, the state would be free to work in eight land use decision making areas:

1. Decisions affecting or affected by past or projected major public facilities or other projects representing a major public investment.

2. Decisions concerning areas containing or having a significant impact upon historical, natural, or environmental resources of regional or state wide importance.

3. Decisions concerning areas that embody a significant natural hazard.

4. Decisions concerning areas proposed as sites for new towns.

5. Decisions which have significant impacts beyond the jurisdictional boundaries of a local government.

6. Coordination of all levels of government including state agency actions.

7. Creation of an arena for resolving conflicts arising in the first six areas.

8. The formulation and articulation of growth and development policies.

Consolidating the allowable areas of state intervention into administrative functions yields four activities in which the state should have at least a supervisory and sometimes a dominant role:

1. The designation and regulation of areas of state concern.

2. The designation and regulation of developments of greater than

local impact.

3. The provision of an appeals procedure and a Montana Land Use Commission to resolve conflicts and insure that statewide interests are considered by local decision makers and that local interests are considered by state decision makers.

4. The creation of a continuous statewide goals formulation process.

The first two activities require the establishment of new administrative functions: decision making processes in which the state's role would be primarily one of supervision and assistance. Only after local government was given and had refused the opportunity to accept the responsibility of governing would state government assume an active role. The third activity would require an essentially passive state role; the state would provide an arena for resolving conflicts in the land use decision making process. The fourth activity, also a process, would include all levels of government and a wide spectrum of private interest groups in a comprehensive effort to construct goals. State government is the logical leader of such a program.

The Environmental Quality Council recommends that legislation be enacted to implement these functions.

Areas of State Concern

Areas of state concern are defined as localities or resource systems whose uncontrolled development would result in irreversible loss or damage to a significant resource of a region or of the state as a whole. Included are:

--Areas affected by or affecting substantial public investments such as educational, medical and penal institutions; convention, civic and sports complexes; state-owned game ranges, and major airports.

--Areas including or having significant impact on historical, aesthetic, natural or environmental resources such as proven mineral reserves, significant agricultural, grazing, and timber lands, shorelines, and essential ecological systems.

--Areas where development probably would endanger life and property because of natural or man-made hazards such as active fault zones, landslide and avalanche pathways, fire-prone areas and airport approach zones.

--Areas proposed by the state in conjunction with the federal government or private interests as sites for new town development.

Once categories of areas of state concern are established, it is necessary to decide who may suggest areas for designation and who will designate. There are several options in both cases.

DESIGNATION

Areas of state concern could be suggested for designation by anyone: groups of citizens, local governments, state agencies. In the interest of increasing public participation in government, it is recommended that the right to request review of an area for designation be extended to anyone. However, the criteria for reviewing requests should be sufficiently stringent to minimize the number of times government would have to respond to poorly considered or casual requests.

A request to designate an area of state concern should include the reasons for designation, the dangers and losses if the area were not designated, the advantages of designation and general guidelines for regulating development in the area.

In keeping with the principle that governing, if possible, should be done by the government closest to the people, all requests for designating an area of state concern should be submitted to the local government or

governments having jurisdiction over the area. The local government would review the request pursuant to state guidelines and decide whether the request merited further attention. In the affirmative case, the local government would issue a notice of intent to hold a hearing, notify the state planning agency (discussed below), accept statements concerning the area from all interested parties (including government agencies), hold a hearing, and recommend granting or denying the designation request. The recommendation, accompanied by written findings, the hearing record, and copies of all submissions pertaining to the area, would be transmitted to the state Land Use Commission (described below) which would make a final determination.

If the local government found the request for a designation undeserving of further consideration, the parties or agency making the request could appeal to the state Land Use Commission which could concur with the local government or direct the local government to hold hearings and offer a recommendation. If a local government refused to comply with a decision of the commission, the commission could seek judicial remedy or direct the state planning agency to hold hearings and submit findings.

Alternatives for lodging the designating authority include the local government (with automatic appeal to the Land Use Commission), the governor, the legislature, a state agency, or any combination of these. Each of the choices has significant drawbacks. If final determinations of local governments can be appealed to a state level commission then the state may be habitually overruling local governments, creating another source of intergovernmental friction. The governor and the legislature rarely would be able to devote full attention to land use issues; and their involvement would unnecessarily extend the time required for designation. The Montana

legislature has tended to avoid charging a single administrator (such as the governor) with responsibility of the magnitude of designating an area of state concern. Traditionally this has been the type of task assigned to a quasi-judicial board.

The Environmental Quality Council recommends that the final designation of an area of state concern be made by the Land Use Commission.

The commission would consider the original request, material submitted to the local government, the record of the local hearing, and the recommendation of the local government. If additional evidence was required, or if the local government had violated established procedure, the matter would be returned to the local government for further hearings. The commission could be petitioned to reconsider its decision upon the presentation of new evidence or evidence of a procedural error on its or local government's part. Those who would be allowed to petition would include affected landowners, the party filing the request for designation, the local government involved, and the state planning agency. The decision of the commission would be an order on designation accompanied by findings specifying the reasoning used in the order, the advantages and disadvantages of designation, the loss if not designated, and general criteria for the area's development regulations.

After an area of state concern was designated, the local government or governments having jurisdiction over it would be given (say) six months to prepare detailed development regulations based on the designation order and the guidelines promulgated for that category of area by the state planning agency. Financial and technical assistance would be provided by the state to help prepare the regulations. As an option, local governments could

request the state planning agency to act as a consultant for the preparation of regulations.

After approval by the local governing body, the development regulations would be circulated to state agencies and interested parties for comment. The regulations would either be approved by the Land Use Commission or returned to the local government for revision. Once the regulations were approved, the local government would administer and enforce them through a permit system.

If a local government refused to prepare development regulations, the Land Use Commission could direct the state planning agency to prepare them and direct the local government to enforce them. If a local government refused to enforce development regulations, the Land Use Commission could either direct the state planning agency to enforce them or seek a court order requiring compliance.

To direct the state planning agency to enforce regulations in an area some distance from the capital city seems cumbersome, but the alternative of requiring a state government unit to take a local government to court is distasteful. Yet laws that are not enforced are worthless. A sure remedy must be provided.

Any process for designating areas of state concern must include provision for interim controls; it would be folly to delineate an area as an exceptional resource and then leave it unprotected for any length of time. It is recommended that interim controls be instituted at the time local government issues a notice of a hearing in response to a request for a designation. The development regulations suggested in the request for designation could be used as interim controls, or the state planning agency could promulgate general controls for each category of area of

state concern.

Provision must be made to rescind the order designating an area of state concern. It is recommended that this process be initiated by a request to the local government or governments involved for removal of the designation. Subsequent action would parallel that required following a designation request. Provision also must be made to drop laggard proceedings. If development regulations were not prepared and approved within (say) 18 months after the local government issued a notice of hearing in response to a request for designation, the process would be terminated and the request denied.

Developments of Greater Than Local Impact

Developments of greater than local impact (DGLI) are defined as proposed developments which, regardless of where they occur, have significant effects beyond the boundaries of the local government having jurisdiction over the development site. Major shopping centers, large subdivisions, industrial complexes, and public works projects are examples of Developments of Greater Than Local Impact. Also included under this land management concept are procedures for insuring local input to state land use decisions.

Currently, this type of development is reviewed independently by state agencies for compliance with specific technical criteria and by local governments for weighing against unspecified value considerations. Usually, local government review occurs without benefit of a technical review. The Environmental Quality Council recommends a consolidation of these two complementary aspects of decision making--technical review and value assessment.

It is recommended that the legislature stipulate general guidelines for designating Developments of Greater than Local Impact and that the state planning agency be responsible for promulgating specific criteria. A DGLI

would be determined by the number of persons likely to reside or be employed at the development, size of site, likelihood of associated development, traffic generation, and the environmental impacts of the development. These criteria would vary from one regional area to another. What might be a Development of Greater than Local Impact in Broadus might not be one in Missoula.

A developer whose project appears to have greater than local impact would be required to complete a permit application provided by the state planning agency. The local government having jurisdiction would review the application on the basis of state guidelines and decide for or against classification as a DGLI. However, these guidelines should not be all-inclusive and a local government should be allowed flexibility in classifying a development as a DGLI. The decision on the classification should be appealable to the Land Use Commission by any citizen.

After determining that a proposed development qualifies for DGLI classification, the local government would send a copy of the permit application to the state planning agency and issue a notice of intent to hold a hearing on a Development of Greater than Local Impact. Either the state or the developer would make copies of the permit application available publicly. State agencies and all other interested parties would be allowed to submit a review of the proposed project and participate in the hearing.

To insure that local government officials make their value decisions in light of the results of technical considerations, it is recommended that all state agencies with permit authority pertaining to the proposed development be required to complete their investigations and present their determinations at or before the local government's hearing. The Environmental Quality Council thinks that local officials making value determinations ought to have the final say in this area, subject to appeals based on whether procedures were reasonable and thorough.

Within (say) 30 days after the hearing, the local governing body would have to decide to deny, approve, or approve with conditions the development application. The local government would be required to issue an order stating its decision and the findings to substantiate it. In coming to its decision the local government would have to consider the impacts of the development beyond as well as within its territorial boundaries. Carefully considered criteria for implementing this requirement should be included in the law. There are at least two approaches to this task.

The legislature could stipulate a number of criteria that the local government would have to find adequately satisfied before a permit were issued. For example, local government could be required to determine that the proposed development:

1. Would not place an unreasonable burden on existing public services, such as highways, schools, and police and fire protection.

2. Would have sufficient water available for its foreseeable needs.

3. Would not have significant adverse effects on the natural environment and would not cause undue air or water pollution.

4. Would not adversely affect existing land uses, scenic characteristics, natural resources or property values.

5. Would have adequate sewage and solid waste disposal facilities.

The Environmental Quality Council recommends, however, that local governing bodies be required to determine that the probable benefits of the project exceed the probable detriments. Presumably, this is the thought process employed now by county commissioners and city fathers, only it is done implicitly without step by step analysis and disclosure of the benefits and detriments. The legislature should require the local governing body at least verbally to define the benefits and detriments of a project in a number of areas, for example:

1. Favorable or adverse effects on other persons or property owners.

2. Immediate costs for additional local government services versus the expected long-term tax base increase.

3. Favorable or unfavorable impact on the human environment, including a recognition of intangibles: community character, beauty and ugliness, convenience and necessity.

4. The appropriateness of the development given alternative locations within the local jurisdiction and elsewhere.

A decision of local government on a DGLI could be appealed to the state Land Use Commission by the developer, the owner of the property to be developed, adjacent property owners, the local government, the state planning agency, and any person or group that participated in the local government's review of the project. The Land Use Commission would review the permit application, material submitted to the local government, the record of the local hearing, and the order and findings of the local government. The commission could concur, overrule, or modify the decision of the local government based on its findings that the local government erred in procedure or in its assessment of benefits and detriments. The decision would be delivered in writing accompanied by an explicitly presented assessment and balancing of local and regional (or statewide) benefits and detriments accompanying the proposed project.

Reviewing State Agency Decisions

Much has been made during the last few years of the goal of decentralization and allowing local governments to have more involvement in the exercise of state power. Yet today only district councils offer an organized channel for local governments to influence state agency decision making, and there is only one officially certified district council. Certainly, there are many valid reasons for decisions to be made solely at the state level and there are certain federal regulations that legally may be administered only by a state agency. However, many decisions which significantly affect the use of land

are being made without the involvement of the local government closest to the effects of the decision.

In keeping with the principle that state government actions should be subject to the same regulations as private actions, the EQC recommends that appropriate state agency projects be subject to the DGLI process. However, actions which the legislature has clearly determined to be of such magnitude and effect that only state government can adequately assess their consequences should be excluded. Projects regulated by the Utility Siting Act and the determination of the alignments of interstate and primary highways fall into this category.

In addition, the lack of coordination between the state and local levels of government forces private developers to make repeated, sometimes costly presentations of their projects. For example, current laws on water, sewage and solid waste disposal facilities in new subdivisions require a developer to submit much the same information to both the local government and the Department of Health and Environmental Sciences. The county commissioners, who should be making the final decision regarding a subdivision, often are legally bound to approve or disapprove a project without knowing the results of the health department's investigation. This process takes the decision making away from its rightful place in local government.

A similar situation probably will occur in the regulation of indirect sources of air pollution as required by the federal Clean Air Act. Under the proposed process for implementing this act, the Board and Department of Health will have the final say on major commitments of land areas for major shopping centers, large subdivisions, industrial complexes, airports and other developments. This decision will be made solely on the basis of air quality standards.

The Environmental Quality Council thinks that major commitments of land involve more than air or water quality, or the suitability of the site for

reclamation. Technical standards for these considerations must be satisfied, but major commitments of land involve value judgments that cannot be made equitably by bureaucrats. Value judgments should be made by elected officials or groups of citizens selected for that purpose.

Appeals Procedure and State Level Organization

LAND USE COMMISSION

The Environmental Quality Council recommends that a Montana Land Use Commission be created to hear appeals concerning areas of state concern and Developments of Greater than Local Impact. The commission would provide an arena where statewide interests could be presented and protected if local governments refuse the responsibility of governing or reach decisions based only on parochial interests.

In hearing appeals the commission would resolve conflicts among state agencies and between levels of government. In this capacity the commission could coordinate and lend consistency to major land use decisions throughout the state for the first time.

For example, the location of an interstate highway interchange probably would be a Development of Greated than Local Impact (although the highway alignment itself probably would be exempted from DGLI designation). The local government (say a county) having jurisdiction over an area where an interchange is proposed would hold a DGLI hearing at which the Department of Highways would present its plans, probably including alternative locations. Interested citizens, other (perhaps adjacent) local governments and other state departments would present their positions on the proposed interchange locations. The county planning staff or the state planning agency would organize the hearing testimony in a useful form for review by the county commissioners. The commissioners' decision would be presented in writing and substantiated

by findings based on the local and regional benefits and detriments of the location actually chosen by the commissioners. The criteria for making this determination would be similar in scope to those in the Utility Siting Act (Sec. 70-801, et seq. R.C.M. 1947) which directs the Board of Natural Resources and Conservation to make decisions on siting energy conversion facilities. Those holding that the county commissioners violated established procedure or failed to make their decision pursuant to the statutory guidelines could appeal to the Land Use Commission.

If a preliminary review of the appeal found that it raised substantial issues then the Land Use Commission would determine, by review of all relevant testimony and advice, whether the county commissioners had reached a sustainable decision.

The Land Use Commission should consist of five members appointed by the governor with the consent of the Senate. The commission's citizen members should represent the geographic diversity of the state. The commission itself should be protected by law from domination by any interest group. Ideally, a commission resolving conflicts among state departments would be attached to the governor's office. However, Montana has had few functional agencies attached to a governor's office and such placement might violate the intent of executive reorganization. It is recommended, therefore, that the Land Use Commission be attached to the Department of Administration for administrative purposes only and provided that this placement be made only to satisfy the requirement that all boards and commissions be attached to a department (Article VI, Sec. 7, Montana Constitution). The commission would require a small staff to screen appeals, compile material for the consideration of the commission and generally perform housekeeping chores.

The primary responsibilities of the commission would be designating areas of state concern, reviewing development regulations for designated areas and

hearing appeals of local government decisions. Appeals could be made concerning decisions on initiating the area of state concern review process, the designation of a particular project as a DGLI, the decision on a DGLI, the handling of permits within areas of state concern and the enforcement of the regulations developed for a DGLI.

The commission also could be directed to approve rules promulgated by the state planning agency concerning areas of state concern and DGLI. However, involvement of the commission in administrative action would violate the intent of executive reorganization and might compromise its role as an appellate body.

STATE PLANNING AGENCY

The Environmental Quality Council recommends that the role of the state planning division of the Department of Intergovernmental Relations be clarified and expanded. The planning agency envisioned in this study is unlike the majority of existing state agencies in that it would be analysis-oriented rather than mission-oriented. Its primary "mission" would be to provide analytical services at the request of local governments.

The state planning agency would have to be able to work closely with local governments in the compilation and preparation of material for the local governing body concerning areas of state concern and Developments of Greater than Local Impact. The agency also would have to act on requests as a consultant and render assistance to local governments in the preparation of development regulations for areas of state concern and in the evaluation of DGLIs, and respond to directives from the Land Use Commission for the preparation of development regulations when a local government fails to do so. The state planning agency also might represent other state departments at local government hearings concerning areas of state concern and DGLIs.

The planning agency also would issue detailed rules for reviewing requests to designate areas of state concern, for classifying projects as Developments of Greater than Local Impact, and for evaluating benefits and detriments associated with DGLIs. Interim development control guidelines for categories of areas of state concern also would be needed to encourage comparable regulation statewide.

The state planning agency would publish a newsletter detailing activities of local governments and the Land Use Commission on requests to designate areas of state concern and to classify projects as Developments of Greater than Local Impact. But the newsletter would be only part of the state planning agency's expanded informational role. The agency also would be responsible for maintaining a land use planning information center. The center would allow access to the vast quantities of information about Montana being gathered by the 19 state departments and would be available to all state agencies and local governments to help them make the complex land use decisions they would face.

Reviewing a request for designating an area of state concern would involve assessing the statewide or regional values of an area and its capability to support use while retaining those values. Determining and ranking values could be done equitably only by the people, their elected representatives or by citizen commissions. Analyzing the capability of an area to supporta land use would require assessment of the natural and cultural systems, their interaction, and the changes that would result from the use.

The regulation of an area of state concern would entail a balancing of: values, the impacts of land uses, the capability of area's systems, and the expectations of property owners.

Similarly, the evaluation of Developments of Greater than Local Impact would require assessing statewide or regional values represented in local natural and cultural systems, and assessment of the requirements and impacts of land uses.

Cultural system values are embodied in the community's life-style, its cohesiveness, the protection of public health and the cost of providing public services such as roads, schools and police and fire protection. Natural system values include unquantifiable aesthetic factors and psychic needs, the ability to sustain a use over the long term and the work that nature does for man without charge, such as providing rainfall, breaking down wastes, and providing wild game. The complex web of cultural and natural system values present at a locality has only a certain capability to withstand the impacts of land use; exceed the capability and the values are lost.

For example, a locality that can withstand the impacts of economically viable agriculture and retain its cultural and natural values must at a minimum be accessible, reasonably close to markets and supply centers, include soils that can sustain cultivation or grazing without eroding or becoming saline, and be part of a hydrologic system that can withstand volume reductions and still dilute agricultural runoff without excessive damage to aquatic life.

On the other hand, each use that man makes of land has specific requirements for raw materials, labor force, waste disposal, access and natural environmental support. Continuing the example, economically viable agriculture requires (at a minimum) markets, petroleum, fertilizer and machinery (from cultural systems), and productive soils, relatively flat topography, water and a certain climate from natural systems.

The DGLI process is intended to decide the siting of projects based on the best possible matching of natural and cultural capabilities of localities with the requirements and impacts of land uses. Some natural and cultural system values now are protected by minimum standards in laws concerning air and water pollution control. However, it is not possible to protect every value in all siting decisions. When deciding among values it is essential that decision makers have the best available information on capabilities, requirements, and impacts.

Unfortunately, the existing state personnel with the training and experience to work with local governments and to compile and interpret the data needed for these decisions are dispersed between two state agencies. The people with the necessary skills in natural science, sociology, economics, and land use planning are within the Energy Planning Division of the Department of Natural Resources and Conservation. As the name of the division implies, it is a planning agency. Those with skills in intergovernmental coordination and other aspects of land planning are with the Planning Division of the Department of Intergovernmental Relations.

In the interests of governmental efficiency the Environmental Quality Council recommends that the Energy Planning Division and the Planning Division be consolidated into a State Planning Division.

This consolidation would enable energy planning, which is involved in utility siting decisions that will affect significantly the future of the state, to be associated with a broad state planning effort hinged to the needs and desires of local government. In addition, the Montana Land Use Commission, because it would have specific responsiblity in land use and would develop extensive expertise in the area, should assume administration of the Utility Siting Act now administered by the Board of Natural Resources and Conservation.

Since the primary mission of the proposed State Planning Division is to assist local government, the division logically belongs in the department with responsibility for liaison between state and local government. If local governments are given the responsibility of governing in an area as sophisticated and demanding as land use analysis, the state must be prepared to deliver substantial direct assistance to local government on request. With such expanded responsibility and mandate, the title Department of Planning and Local Affairs would best identify the role of the Department of Intergovernmental Relations.

A LEGISLATIVE COMMITTEE

To expedite legislative involvement in the state land use decision process, it is recommended that a joint legislative committee on land use be created. The Land Use Commission would report to the committee annually. To insure representation of the legislative groups with a major interest in land use while preventing domination by any one group, this committee should include the chairpersons and/or vice-chairpersons of the House and Senate committees on Fish and Game, Highways, and Natural Resources, and the Senate committee on Local Government.

Outlining a Policy Statement

Working together to form an interlinked decision making system, the functions of designating areas of state concern and Developments of Greater than Local Impact, and the activities of the Land Use Commission, would implement a state policy for making land use decisions. This policy would be consistent with the Montana Environmental Policy Act and would declare that:

1. An individual's right to property is basic, guaranteed by the U.S. and Montana Constitutions and accompanied by certain responsibilities.

2. The state has a limited but legitimate interest and responsibility to intervene in land use decisions when interests and values of citizens in a region or throughout the state are significantly affected.

3. Elected local officials and citizen commissions are responsible for decisions determining and protecting the values of the people.

4. State government encourages, and supports with technical and financial assistance, the efforts of local officials to govern responsibly.

Policy consistent with the Montana Environmental Policy Act must recognize that sustained economic productivity depends on the maintenance and enhancement of environmental integrity, that each person is entitled to a healthful environment,

that today's citizens are the trustees of the environment for succeeding generations, and that an objective of government must be to strike a balance between population and resource use.

Statewide Goals and Priorities: Growth and Montana's Future

The Environmental Quality Council's Land Use Questionnaire found a compelling unanimity in the desire of local officials to preserve the agricultural values of the state. Recent statements by the governor and other officials, and editorials in the press, indicate that Montanans want control of the state's future. Governor Thomas L. Judge has summarized the need and the desire very well:

> All of Montana's planning programs and related laws, significant as they are, cannot define the level of growth and subsequent quality of life that we desire. They cannot decide whether we want a population of 700,000 or several million. They cannot choose between an agricultural or an industrial society. Only Montanans can make such choices, but until our objectives are clearly articulated, our best planning efforts cannot but remain disjointed at best, and divergent at worst (65).

Montana stands today at a crossroads. Decisions made over the next few years on the use of land will commit the state irreversibly. Before too many of these decisions are made, Montanans must define, as best they can, their goals and values. More than half of the 50 states have such programs. A clear, unified articulation of our values and goals would offer policy guidance to local governments, the legislature and the governor. Incorporated in legislation, the articulated goals and priorities of values could resolve the inconsistencies and correct the impotence of the state's overall land use policy.

This study recommends a policy and process for making certain land use decisions, but these are just tools--guidance is needed from a broader perspective. A policy for making land use decisions can guide Montana to any of a number of futures; Montanans must choose their most desirable future and direct the process to achieve it.

Protecting regional and statewide interests in areas of state concern and in Developments of Greater than Local Impact can insure that Montana is not overwhelmed. But the firm guidance of a growth policy is needed to prevent the step by step disintegration of subtle and unique relationships that now exist between the state's citizens and the land. No case-by-case review process can accomplish this. To bend the future to their will the people of Montana must be willing to establish a priority of values and hold decision makers accountable for the difficult job of trading low priority values for high priority ones.

Montanans need an institutional forum for asking and exploring answers to two fundamental questions concerning growth and development: What do we want tomorrow's Montana to be like? and What kind of growth should occur where?

The Environment Quality Council recommends the creation of a Commission on Growth and Montana's Future to provide this forum.

ADDITIONAL TOOLS TO GUIDE LAND USE

In addition to the land use decision making process recommended by this study, there are numerous tools the legislature could use or provide to local governments to guide land use.

Taxation

Taxation by itself cannot solve Montana's land use problems, but recognition of the land use implications of the taxing power and its deliberate use can assist in guiding land use decisions. The equalization of assessment procedures throughout the state was a significant step, and directing that assessments be coordinated with local planning efforts would be another step. The greenbelt law (Secs. 84-437.1 to 84-437.17, R.C.M. 1947) is also an example of the use of taxing power to influence land use decisions.

USE VALUE ASSESSMENTS FOR FARMLANDS

Montana's greenbelt law provides statutory authority for the "use value" assessment of agricultural land. This law is intended to keep farmland in production by reducing the property tax burden from what it would be if the agricultural land were taxed at market value. This burden is particularly heavy near growth areas where land is in demand for suburban purposes. The legislature has assumed that decreasing the tax burden on farmland decreases the incentive to place agricultural land in non-agricultural uses. However, there are serious questions whether the greenbelt law is influencing land use decisions in the way the legislature intended. Major problems appear to be:

1. Lack of prohibition's against the application of the bill to areas planned by local governments for the extension of urban services and uses. This failure encourages speculation and induces conflict between local planning and state tax policy.

2. The three statutory requirements for agricultural land classification, only one of which must be met to receive the classification and a tax reduction, are too loose. One requirement is that the land must have been assessed as agricultural land for the previous three years, and currently must be used for agriculture. But the requirement does not consider acreage put to use or gross farm income. Thus a small parcel of land historically devoted to agriculture but sold for a building site can receive agricultural classification if a single horse is grazed there. A second requirement holds that the owner must have a minimum annual gross income of $1,000 from the agricultural use of the land, regardless of acreage, to qualify for the greenbelt tax break. Under this criterion most of a 100-acre parcel could be sold or used non-agriculturally while still retaining the tax break. The third requirement allows agricultural classification if at least 15 percent of the owner's income is derived from farming. This provision discriminates against farmland

owners who need non-farm income to survive.

3. The rollback tax penalty, assessed when greenbelt land is put to non-agricultural use, is insufficient to discourage the removal of land from agricultural production. The following two examples demonstrate this:

Example 1

A farmer owning 1000 acres of irrigated land in Missoula County considers selling 500 acres to a developer for $350 per acre. The land originally cost the farmer $50 per acre.

Based on the 1972 average tax per acre of irrigated land in Missoula County and the 1972 Missoula County mill levy the tax on the 500 acres in agricultural and residential use can be calculated (20). From this calculation the penalty under the greenbelt law for converting the land from agriculture to residential use can be determined.

County Mill Levy: 164.96

Average tax per acre on irrigated land: $1.71

The tax on 500 acres of average irrigated land in Missoula County in 1972 was 500 times $1.71, or $855.

When sold for residential use at $350 an acre, the market value of 500 acres is $175,000. To determine what the 1972 tax on this land would have been it is necessary to calculate the assessed value (40 percent of the market value), the taxable value (30 percent of the assessed value) and multiply the taxable value by the mill levy.

175,000 times .4: $70,000 assessed value

70,000 times .3: $21,000 taxable value

21,000 times .16496: $3464 in taxes

The difference in the tax for the two uses equals $3464 minus $855, or $2609. Based on the penalty provision of the greenbelt law a four-year rollback penalty for the 500 acres would be $2609 times 4, or $10,436.

Subtracting the original cost of the land ($25,000) from the selling price ($175,000) leaves the farmer a capital gain of $150,000. Would a penalty of $10,436 affect the farmer's decision to sell out and realize a $150,000 capital gain?

Example 2

A rancher owning 1,000 acres of non-irrigated land in Yellowstone County considers selling 500 acres to a developer for an average of $250 per acre. Original purchase price of the land averaged $30 per acre.

Based on the 1972 average tax per acre on non-irrigated land in Yellowstone County and the 1972 Yellowstone County mill levy, taxes on the 500 acres in agricultural and residential use can be calculated (20). From this calculation the penalty under the greenbelt law for converting the land from agriculture to residential use can be determined.

County Mill Levy: 145.12

Average tax per acre on non-irrigated land: $ .81

The tax on 500 acres of average non-irrigated land in Yellowstone County in 1972 was 500 times $ .81, or $405.

When sold for residential use at $250 per acre the market value of the 500 acres is $125,000. The 1972 tax on this land is determined as in Example 1:

$125,000 times .4: $50,000 assessed value

$ 50,000 times .3: $15,000 taxable value

$ 15,000 times .14512: $2176 in taxes

The difference in tax for the two uses equals $2176 minus $405, or $1771. Based on the penalty provision of the greenbelt law a four-year rollback penalty for the 500 acres would be $1771 times 4, or $7084.

Subtracting the original cost of the land ($15,000) from the selling price $125,000) leaves the rancher a capital gain of $110,000. Would a penalty of $7084 affect the rancher's decision to sell out and realize a $110,000 capital gain?

Some specific suggestions for correcting defects in the law are:

1. Increase the allowed minimum acreage figure from 5 to 10 acres.

2. Do away with the percent-of-income option to qualify and tie the historical use option to a minimum gross income figure related to land classification and number of acres. The more productive and expansive the land the higher the minimum income figure.

3. Tighten other criteria for determining who is a bona fide farmer. The following can serve as indicators to guide reform of the greenbelt law requirements:

--If the property is sold at a per acre price substantially higher than the market price for similar agricultural land, this may suggest a purchase for other than agricultural use.

--Can the property qualify if it is being leased? If so, should there be a minimum number of years that the current owner must have owned the land?

4. Revise the penalty provision to comply with one of the following options:

--Extend the current rollback period from four years to at least eight or 10 and add an interest payment on the amount owned plus a flat charge for each acre transferred out of agricultural use.

--Require the owner applying for agricultural classification to enter into an agreement that the property will remain in agricultural use for a period of (say) 10 years. At the end of the period the owner could change classification if he intends to change the use of his land. If the use is changed before the end of the agreement, there would be substantial penalties, perhaps a 15-year rollback plus interest and a penalty.

--Relate the penalty fee to the productivity of the land. The more valuable the agricultural land the tougher the penalty fee to encourage the retention of productive agricultural properties.

It must be remembered that a "use value" assessment procedure will not, by itself, preserve agricultural land. Experience in other states has been that land given special tax treatment will be sold or converted to another use when the price is right.

There are other uses of the taxing power to guide land use decisions:

TAXING JURISDICTIONS

Even after equalization of assessments, property tax burdens still could be significantly different between a $25,000 residence outside the city and a similar residence inside the city limits. This is due to the differing tax jurisdictions: one being the county with a school district; the other comprising the county, a school district and the city. The city is able to levy taxes in addition to the amount already levied by the county and school districts. Boundaries between taxing jurisdictions are arbitrary and usually bear little resemblance to the geographical boundary of the area served by public facilities. Today, there is a real need for authority to tax on the basis of services received. Exercising the authority would require delineation of "service areas" in which all residents would be taxed equally to support equal public services.

LAND VALUE TAXATION

Land value taxation would shift the tax burden from buildings and improvements to land. Property owners would be encouraged to build on vacant lots where there is a bona fide demand for office space and housing. Property taxes would rise very little once the structures were put up. This would improve the financial health of building projects in general. A second effect would be to make the speculative holding of land for future development extremely costly and thereby decrease the economic incentive for "leap frog" sprawl caused by the holding of developable land for capital gains.

Land values for tax purposes would be influences heavily by the property's location and the public facilities and services available to it. Land value taxation is an equitable way to return to the public some of the publicly financed benefits normally accruing only to the private landowner. This taxing system would have to be complemented by an assessment policy giving deference to agricultural land so that farmers near population centers would not be burdened with unrealistic property taxes on large land holdings. Tax zones could be drawn around population centers with the ratio of tax on the land to the tax on improvements approaching equality the farther the distance from the city center.

DEVELOPMENT IMPACT TAX

A development impact tax would be levied on new construction to ease the burden on local governments trying to provide services demanded by new residents. The tax could be related to variables such as number of units, floor area, number of acres, projected capital investment, and employment. The guiding principle would not be to discourage building but to shift the financial burden of growth to the chief economic beneficiaries of that growth, namely the developers. However, the ability of developers to pass additional costs along to consumers raises a question concerning fairness of requiring new residents to pay costs not charged to older residents.

In addition, this tax may not be appropriate or desired in many Montana communities. It could raise building costs during a period of already rapidly increasing building and mortgage costs. However, the tax could be offered as an option available to local communities as part of their existing permit procedures. If a community were to determine that additional growth would mean an increase in the costs of local government, it could levy the development impact tax.

LAND GAINS TAX

Individuals whose primary income is from sources other than the sale or development of real estate are provided an incentive to speculate in real estate by the capital gains provisions of the federal income tax code. For these individuals the maximum tax levied on the actual financial gains from the sale of real estate is 25 percent. For individuals whose normal income might be taxed at rates above 25 percent, these tax provisions make land an attractive investment. Encouraging investment in real estate also inflates land values in areas where property is already in demand.

Montana tax laws treat capital gains realized from the sale of land as federal codes do. In 1973, Vermont enacted a land gains tax to discourage the rapid turnover of land. Under the Vermont system, an additional tax above others is imposed on gains from the sale of land (exclduing parcels of less than 1 acre to be used by the taxpayer as his principal residence). The rate of taxation depends on the amount of time the land is held, and is scaled upward as the gain increases.

A land gains tax makes speculation in real estate less attractive as a tax shelter while preserving the freedom to buy and sell land for a profit. The tax could be designed so that homeowners residing on less than 1 or 2 acres of land are not subject to the tax; the first 20 percent of capital gain is not subject to tax; and anyone holding land for more than seven years is not subject to tax.

What follows is a suggested scale for a Montana land gains tax:

Tax Rate on Capital Gain as a Function of Holding Period and Percent Gain

Time held by Seller (years)	Gain		
	First 20-99%	Next 100-199%	Over 200%
	Tax Rate (%)		
less than 6 mos.	55	70	85
6 mos. - 1 yr.	47.5	60	72.5
1-2	40	50	60
2-3	32.5	40	47.5
3-4	25	30	35
4-5	17.5	20	22.5
5-6	10	10	10
6-7	5	5	5

A SEVERANCE TAX ON TIMBER

Montana's private forest lands currently are taxed on the basis of market value of the standing timber, and the market value of the land. This tax system is an incentive to harvest timber in order to reduce property taxes. Good forestry practices may be discouraged when owners realize that taxes may increase as the quality of timber improves.

Considering the value of well-managed forest land for Montana's water resources, wildlife, recreational opportunities, and wood products industry, a severance tax based upon the value of the wood at the time of the harvest in lieu of the present market value tax would mitigate the adverse economic, social and environmental impacts of the current system. By applying the severance tax to timber harvested from federal lands as well, additional revenue would arise from timber cuts that are currently escaping state taxation altogether. The timberland

tax system also would become simpler to administer--there would not be need to determine market values for standing timber.

A problem would remain of how to mitigate the effects of reduced local taxable valuations on school district budgets. The receipts from harvested timber could be returned to the counties and school districts to offset tax revenue lost by removing standing timber from the property tax rolls. However, bonding capacities, bond repayment schedules, and voted levies still are dependent upon local taxable valuations. A careful analysis of these relationships would be required before a severance tax on timber would be prudent.

TAXES ON MOBILE HOUSING

Currently, trailer houses are taxed as personal property on a sliding scale which reduces the assessed value gradually to reflect depreciation in the structure's market value; a six-year-old mobile house is assessed at about 25 percent of its original cost. A new one is assessed at 40 percent of its cost. Although this scale represents one reality of the marketplace (that trailers depreciate), single- and multiple-family dwellings and apartment units (permanent housing) normally appreciate with age. Thus, while permanent housing increases local taxable valuation over a period of time, mobile houses necessarily decrease local taxable valuation over time. All housing types, however, demand similar public services.

During periods of increasing costs to maintain a given level of public services, communities in which mobile homes constitute a large share of the housing will experience a widening gap between taxable valuations and public service costs. As the gap grows, so will the tax burden on owners of permanent housing.

Today, trailer houses represent a greater percentage of new housing than ever before in Montana's history. Continued high rates of inflation probably will

exacerbate this trend as permanent housing remains out of the reach of a growing percentage of young families.

A taxation system for mobile housing based on market value may result in financial problems for local governments in the long run. This fact should be acknowledged today, and an effort begun to determine how best to tax mobile housing in order to prevent its long-term subsidization by owners of permanent housing.

Other Tools

Zoning, long a process used to guide the growth of cities, has been the subject of increasing criticism in recent years. In rural areas, zoning has never proved satisfactory and is particularly unpopular with agricultural people. Several other tools for guiding land use and for the equitable protection of agricultural land have been developed and are being tested throughout the United States.

TRANSFERABLE DEVELOPMENT RIGHTS

Transferable development rights is an innovative technique to guide land use by creating a market in "development potential" that can be transferred from one locality to another.

In legal theory, the right of property ownership is made up of a number of constituent rights. One of the constituent rights is the right to develop or change the use of land. Like mineral and surface rights, development rights can be separated from land ownership. This severability has long been recognized in certain cases and has been demonstrated by the purchase or condemnation of particular property rights by government to secure scenic easements, and by the private sector to obtain right of way for private roads across property.

Numerous planning and legal authorities have suggested that a market be created for the transfer of development rights by the normal market mechanisms. For example, a local government might designate an area for open space or agriculture and prohibit other types of development. Landowners in the area designated would continue to own their land but would be compensated for the loss of development potential by being allowed to sell their unusable development rights to other landowners who might wish to develop in areas where development is allowed. By purchasing additional development rights, a developer could increase the degree of development allowed on his property.

New York City adopted in 1968 a resolution allowing the transfer of an historic landmark's air rights to non-contiguous lots. In vertically oriented downtown Manhattan the air space over an historic landmark includes a very valuable development right. The object of the resolution was to encourage preservation of landmarks by allowing their owners to transfer their unused air rights to another lot and thereby build higher than would otherwise have been allowed.

The town of Southampton in Suffolk County, New York has adopted a local zoning ordinance permitting transfer of development rights to preserve prime agricultural land. In certain areas farmers are allowed to transfer the development potential of their entire farm to a small portion of their acreage and then sell the portion with the increased development rights. The remainder of the farm must be dedicated in perpetuity to a public land trust. The farmer and his heirs have the first option to lease the dedicated land at nominal fees for agricultural purposes. The program is entirely voluntary and allows several farmers to cooperate in preserving their farms for large-scale farming operations. At the same time, agglomerating the development rights from several farms produces clustered development areas with low public service costs.

In 1971 Illinois enacted a law permitting the use of development rights transfer to aid historic preservation. The legislatures of Maryland, New Jersey and Colorado have considered bills providing authority and procedures to establishing transferable development rights, but all were killed or postponed in committee.

The 1974 Michigan legislature enacted a law providing for farmland development rights agreements and open space development rights easements (Act No. 116, Public Acts of 1974).

Transferable developments rights is a new and relatively untried concept, still to be tested in court, but deserving of further consideration. (A report on transferable development rights is available from the EQC. It was prepared by Dave Kinnard, EQC Legal Assistant.)

LAND BANKING

Land banking is a general term applied to programs in which a government entity acquires and holds land to influence and direct the future growth of a region. Land banking provides government with a flexible and absolute control over land that cannot be achieved through regulation.

Land banking has been used to insure an adequate supply of land at a reasonable price for future use, to facilitate the efficient and economic extension of public services into an area before it is developed and to capture for the public the increase in land value which results from providing public services. Land held in the bank can be resold to private developers as needed to accommodate growth or it can be pre-planned and resold to developers to achieve specific purposes. Buy-Lease Back is a variation of land banking used primarily to protect agricultural land from development. Farms threatened by suburban sprawl are purchased by the government and rented back to farmers under long-term, low-cost leases.

Although of limited use so far in the United States, land banking is an important land use tool in several European countries and in Canada.

Prominent among efforts at land banking has been the development and expansion of Stockholm, Sweden. Eighteen well-planned new cities, each with a population of 250,000, have been built on land acquired by the city's land bank. The Netherlands also has a public land acquisition program dating back to the beginning of this century. Nearly every municipality in the Netherlands has developed an active land banking program which is administered by an independent government agency. Denmark, the United Kingdom, and Israel have initiated programs to guide urban growth through the large-scale public acquisition of land.

Canada, however, provides persuasive evidence close to home that land banking can give order to urban growth. Since the 1930s a substantial number of Canadian municipalities have guided their growth by large-scale land banks. The land banking program in Saskatoon, Saskatchewan, has been so successful that approximately 80 percent of the city's residential development and 95 percent of the industrial expansion has been on land bank land.

In 1972 the Province of Saskatchewan established a provincial land bank to accomplish two goals. The first goal was to provide a continuous opportunity to sell land at average market prices regardless of local market conditions and provide an effective method of transferring land from generation to generation. Second, and probably the most important goal, a new system of land tenure was to be established enabling farmers to hold land securely throughout their farming lives without having to invest large amounts of scarce capital in land. Rent for 1974 on banked land has been set at 5.75 percent of land value. Buildings and improvements are sold to the lessee, and after five years the lessee has the opportunity to purchase the land as well.

Land banking is not entirely alien to the United States. About a third of U. S. cities over 50,000 inhabitants have programs to acquire land for schools and parks long before the land is needed. This is a form of land banking. Acquisition of industrial land by municipalities attempting to attract industry is another example. The major U.S. effort at land banking to date has been the urban renewal program.

Some states have enacted legislation allowing the use of land banking for urban development. Foremost is the New York Urban Development Corporation Act of 1968 (amended in 1973). The Urban Development Corporation is a public corporation directed to deal with a broad range of urban problems including lack of civic facilities, shortage of housing, physical deterioration, and a lack of industrial or commercial development. The corporation has been authorized to initiate and carry out its programs through the issuance of up to $1 billion in bonds and notes.

A highly innovative program adopted by the town of Southampton, Suffolk County, New York combines land banking with transferable development rights to protect agricultural land in one of the last actively farmed areas on Long Island. This program is described earlier under the heading of transferable development rights.

Although most land banking experience has been in directing urban growth and development, the same approach could be used to protect agricultural land around urban areas and recreational resources in Montana. (A report on land banking is available from the EQC. It was prepared by Dave Kinnard, EQC Legal Assistant.)

CONSERVATION EASEMENTS

Easements are well-established means to acquire certain rights over land. Conservation easements are voluntary legal agreements between landowners and state government or between landowners and private organizations to prevent certain

land uses. Under conservation easements the landowner gives up rights to do certain things with his land.

Conservation easements usually reduce the market value of land but provide landowners with a way to protect the future of their land. In addition, land with a conservation easement usually is allowed a tax break--recognizing its reduced market value. Conservation easements are used in several states to protect open space and areas of special natural and educational value.

DISCLOSURE

No matter how good the decision making process, the public interest still requires protection from unrepresentative influence by interest groups. To build this protection into Montana's governmental process, a strong public officials' financial disclosure law is vital. Only through disclosure can the public know when decision making boards, such as the Land Use Commission recommended in this study, become dominated by a single interest group or persons of similar interest.

Other Needs

In preparing the Land Use Policy Study a number of land use issues came to the attention of the study team that do not fit neatly into the recommendations of this report. Some needs for action are identified in this section:

1. Controlling erosion, sedimentation, and the filling and dredging of lakes and streams was ranked as the third most pressing land management issue by local officials responding to the Environmental Quality Council's Land Use Questionnaire. Yet Montana's laws sorely lack provisions to accomplish these goals.

2. The location of public schools can have significant impact on the use of surrounding lands. Yet local governing bodies do not have statutory authority

to review these decisions. Even in areas where land use plans have been legally adopted, school districts are not required to locate new facilities in accordance with those plans.

3. Given the increasing price of gold and the likelihood that gold dredging (hydraulic mining) may occur again in Montana, the laws regulating these activities need to be updated. Currently, dredge mining is regulated under the hard rock mining act (Sec. 50-1201 et seq, R.C.M. 1947) which does not include specific consideration of the effects of dredge mining.

4. Recent controversies over the allocation of water in the Yellowstone River raise the specter of the construction of new reservoirs. The primary consideration of existing Montana law concerning dams is the safety of the structure. Dams proposed by state agencies, counties, municipalities, or other subdivisions of the state must submit their plans to the Fish and Game Commission to be analyzed for impact on fish habitat. Possible action resulting from this analysis are described under the state agency review of the Fish and Game Commission in this study. Montana's laws regulating the construction of private dams need to be revised in light of today's concerns over stream and river preservation.

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APPENDIX A

Statewide Subdivision Inventory: Summary of Methodology and Recommendations

(Prepared by Rodd Hamman, Research Assistant, Environmental Information Center)

During the summer of 1974, an extensive research project focusing on Montana subdivision trends was undertaken by the Environmental Information Center, a Helena-based, environmental information and education group. The Environmental Quality Council has reviewed the data assembled by the EIC and relied upon the results of the research.

Using definitions and recording procedures established in the Montana Subdivision and Platting Act, researchers examined subdivision data in 35 of Montana's 56 counties. Official subdivision plats and certificates of survey indicated that as of September 1974, a total of 334,017 acres statewide were subdivided into 114,085 lots. Inconsistencies in recording practices and the fact that land sales currently under contracts for deed are often not recorded, led the EIC researchers to estimate that as many as 500,000 acres might be subdivided in Montana.

The standard procedure for each county inventory was to examine the subdivision plats on file in the Clerk and Recorder's Office and list the number of subdivisions per county, the filing dates of the plats, the number of lots, and the total acreage.

Next, certificates of survey were examined for the same information. Not all certificates represent residential development so additional factors were considered. First a 40-acre maximum lot size was designated to eliminate most agricultural land transactions. This limitation was ignored where a county had a separate subdivision file which included developments with 40-acre plus lot sizes. Any certificate obviously not representing residential development was eliminated. Examples of these were surveys of electrical substations, boundary redefinitions, and right of way surveys. But it should be noted that in most cases it was very difficult to determine what the certificate of survey actually represented. If a short statement of purpose

were required by law this problem could be eliminated. Even with these precautions, some certificates of survey representing items other than residential development may have been tallied. But any such errors are far outweighed by the number of unrecorded subdivisions. These recording deficiencies mean that the actual development acreage greatly exceeds the recorded amount.

In an effort to obtain some information on non-recorded development, the final step in the inventory was to consult the assessor, reclassification officer or the county planning staff. These officers sometimes have additional information from tax records or personal knowledge; in fact, several significant developments were discovered which would have been missed without their help.

A major gap in the inventory process was caused by the nature of the contract for deed sale. The use of this contract buries many land transactions for years and makes information concerning contract for deed land transactions almost impossible to find. A law requiring a notice of deed to be filed at the Clerk and Recorder's Office within some specified time after initiation of the transaction would allow up-to-date information to be compiled.

A lesser problem could be solved by eliminating the acreage limitations on the legal definition of subdivision. Instead, subdivisions should be defined as divisions of land for residential use. This would clear up the present confusion concerning certificates of survey. If this recommendation were adopted residential development could be represented by subdivision plats--leaving certificates of survey to represent other kinds of development. A statement of purpose for the survey should be included.

Four other ideas were generated during the survey. First, interest was shown by the county assessment and reclassification officials in requiring land price information to be recorded on subdivision plats and certificates of survey. This information would reduce greatly the appraisal problems involved in rapid land use changes. Tax assessment information could be provided with the application for development.

Second, the Stillwater County Planning Board requires a Soil Conservation Service soil profile to be included with the development application. The SCS soil profile is a valuable information source. The profile is available only for areas where the Soil Conservation Service has completed surveys, but at some point soils information will be available for any development in the state.

Third, a running count should be kept at the county level on subdivision activity. Once primary information is compiled, a periodic updating would be relatively simple. This information could provide data on cumulative impacts of subdivisions for the Department of Health, among other state agencies.

Fourth, standardization of the filing instrument would help greatly in keeping information current. Data on acreage, soils, living units and other items could be handled more easily if a common format were required at the county level. Plat size could be standardized thus easing filing and handling of these instruments.

APPENDIX B

Comments on the Land Use Policy Study Staff Draft Report

State agency members of the governor's Land Use Advisory Council, chaired by G. Steven Brown, commented on the Land Use Policy Study when it was released for review as a staff draft report on September 16, 1974.

Reviewers used a variety of formats to present their comments on the draft and communicated directly with several persons, including John Reuss, EQC Executive Director, Charles Brandes, research coordinator for the study, and Mr. Brown, as chairman of the advisory council.

It should be noted that those comments provided by reviewers mentioning specific pages refer to pages in the draft report. Because in some instances major changes in the report were made, it might be difficult to locate the section referred to by the reviewers in this final version. In general, the comments were most useful in revising the state agency review. The careful attention paid this section by agency representatives saved the staff from many errors and strenghtened the section. But not all of the comments by reviewers resulted in changes. Where agencies questioned our judgment or the feasibility of some recommendation, the staff gave special attention to consideration of what was written initially. Where the agency was persuasive in recommending an alternative, the staff changed the relevant section of the report accordingly. In those instances where the staff was not persuaded, it held out for the belief that from its perspective--the Montana Environmental Policy Act--the original point or recommendation remained valid.

[Commentary by Benjamin F. Wake, administrator of the Environmental Sciences Division, Department of Health and Environmental Sciences.]

Comments on the Montana Land Use Policy Study Staff Draft Report of the Environmental Quality Council dated September 16, 1974

On page 1, the document indicates that House Joint Resolution 9 "directed the Environmental Quality Council to undertake a thorough study of state land practices," etc. A copy of the resolution was not included so that the specific instructions of the legislature could be judged against the document that was prepared; however, at the bottom of page 1, it is indicated that the major purpose of the document was to "convince the legislature that the time had come for the state to act on land use." I'm not sure this was the purpose of House Joint Resolution 9.

The first 5 pages read more like a commercial and do not appear to be of any substantial value to the report.

Except for some excess philosophical meanderings, pages 5 through 10 are very useful.

On page 11 a definition of what agricultural land is should be defined, also "bedroom" communities.

On page 12 it is indicated that it is significant that the 1, 643, 412 agricultural acres went out of production. What is significant about this fact? No explanation is made as to who determined that it was significant or what was significant about it.

On page 12, second paragraph, it says "the data also indicate that the growth in subdivision and second home activity," etc. What is the real influence of second home activity? I doubt that there is a great or even minimal significance to second home activity and the influence on agricultural land. Lumping second home activity into total subdivision activities does not seem to be appropriate.

On page 13 where a comparison is made between four counties and a net decrease in irrigated acreage, there is no explanation why the decrease in irrigated acreage came about with the suggestion, however, that it is due to subdivision activity. In addition, the phrase, "loss of prime irrigated agricultural land" is used with no definition. Why is it determined prime irrigated land and who has defined what that term means so that all can understand and visualize what prime irrigated land looks like?

On page 16 data developed by the Environmental Information Center is used. Had this data been verified?

Pages 17 and 18 could be carefully reevaluated by an independent agency to determine the authenticity of the values indicated. While they may be entirely correct, the information submitted needs a thorough review.

On page 19 the subheading "Development and Urban Sprawl" is indicated. No definition of what "urban sprawl" is given although the implication indicated in the text is that it is something bad.

On page 26, 500,000 acres have been subdivided, etc. or some held for "speculative purposes." What percentage of the 500,000 acres is included in the speculative purposes designation?

[Mr. Wake, continued]

On page 26 the word lifestyle is used. I think this is a catchy phrase that may be entirely misleading and will vary from individual to individual. Until such a term can be defined and generally agreed upon, the term, in this document, is not of great benefit to understanding land use regulations. The same remarks are appropriate to the use of "Montanans" in the last phrase to apparently suggest that the will of the people coincides with the value judgments of the authors.

The many impacts on the local community listed on page 28 are excellent and should receive prime consideration in development of land use decisions.

The first paragraph on page 29 is of substantial significance in the understanding of land use policy. However, I think that specific examples of what has taken place in the states indicated would be of value so that the reader could judge for himself whether such "lack of planning" has been as serious as indicated.

The second paragraph on page 29 is also of substantial benefit.

Page 30 and 31 are also excellent considerations in determining the desirability of a development in a specified area.

The second paragraph on page 33 needs some additional scrutiny having some rather philosophical excursions that may not necessarily fit into the objectives of House Joint Resolution 9.

On page 34 the indication concerning food shortages does not appear to have a great deal of significance relative to land use planning since some farmers, at even this moment, are slaughtering calves in order to keep prices up.

The bottom of page 34 where it is indicated that "non-local ownership may mean a future demand for local public services, schools," etc. suggests that any new demand is bad. This is not necessarily true especially if an area is so sparcely settled that the residents cannot afford to obtain or attract facilities or skills that would be a benefit to all. Simply being isolated does not necessarily make things better.

On page 35, the end of the first paragraph, "local social mores, newcomers, vacationers," etc. are indicated. I think that such a judgment is beyond the scope of the authors of this document. Simply being a newcomer, which we all were some time, somewhere, is not necessarily a bad thing; and whether or not they may respect the "communities way" is irrelevant because the communities way may not necessarily be a good one or it may need substantial improvement which could be provided by newcomers.

On page 36 the opening line indicates the "public" has its own perception of the most desirable future of the community. The "public" is comprised of a large group of separate entities in the community varying in size from a half dozen to several hundred thousand. To make the wide generalization that the "public" has its own perception is hazardous at best. I doubt that such a perception can be clearly identified even in a general election. We have, all too often observed that public discussion draws only a small percentage of the total community and may

[Mr. Wake, continued]

not be indicative of the real thinking of the total community at all. While an "informed public" may have access to the information it requires, if it is unable to understand the information they will not likely make their desires known or felt.

On page 38, the opening statement is that Montana has a land use policy. THis is not true. Montana has programs that affect land use.

At the top of page 39 there appears to be some words missing.

On page 42 under discussion of the Department of Health and Environmental Sciences it is indicated that no agency is charged with long-term solid waste planning. I do not believe that this is necessarily true. Much of the planning and work now in progress will affect the future in a desirable manner over a long period of time. It is planned that way.

Bottom of page 42, the abatement of public nuisances is not effective land use regulator. The experience of the department of over at least 2 decades in enforcing the nuisance regulation is that such enforcement, because of the difficulty in defining a nuisance, is next to impossible.

On page 49 the assertion that the department has taken a "narrow interpretation of the broad policy rule set forth," etc. is an opinion of the authors and does not reflect the more mature judgment of those who have been making the interpretations in the first place. THe fact that the department has been taken to court twice in the last year is not indicative of any narrow interpretation of the policy but lack of understanding of those who have determined to use the courts as a backdoor approach to land use control. This entire paragraph is vindicative and a personal judgment of people who are not qualified to make such judgments. This paragraph should be removed from the document as patently untrue.

On page 82, an appropriate additional paragraph would be that, "while the legislature has created the Montana Environmental Policy Act, it has not provided funds to the agencies upon whom this act impinges." Notwithstanding this lack of funds, the EQC continues to impose stringent and exhaustive and inclusive guidelines concerning how agencies will operate their programs but making no mention of how these programs and these policies and recommendations are to be implemented--without funds.

On page 83 the term "Montanans" is used several times as though there was some unified body which could speak for all the people. While this is an appealing statement--"Montanans can decide what is right for Montana"--it is a more realistic fact that those who are most forceful in their delivery will get their policies acted upon.

Page 142 states "when irreversible commitments of land . . . there can be substantial long-term costs to society." There can also be substantial long-term gains to society. Irreversible commitments of land are not necessarily bad. In addition, at the bottom of the same paragraph there is indicated that "today's market cannot represent future generations." This is not necessarily true. Developments of today's market may be a great benefit to future generations. To make such a statement without qualification is too broad a generalization.

On the bottom of page 142 it also states that "too many Montanans had to leave the state." Who is to make such a judgment? It is quite possible that the people who left were glad to leave and they went because they wanted to. To make such a statement, again, is a broad generalization that is not very convincing.

Page 143 at the bottom of the page concerning the influx of population, it appears that we would be able to have our cake and eat it too.

Page 156, I concur with the general philosophy indicated on this page about local government having a strong voice and being primarily responsible provided there is state backup for non-compliance or inability of the local governments to act.

On page 150 the first full paragraph concerning a "request designate an area..." It seems to me that this would be a place where it could be required that a complete social, economic and environmental impact assessment would be made before the designation could be submitted. It should also be indicated that those submitting the request would be required to pay for the assessment. If it is not felt the assessment could be made at that time, then the state land use commission would be required, before a final determination was made, to provide a complete social, economic and environmental impact statement. It seems strange to me that in this document, considering the magnitude of the decisions to be made, an environmental impact statement and similar economic statement has not been required by the Environmental Quality Council staff who prepared the document.

On page 52, first paragraph, concerning the promulgation of regulations. Would the Environmental Quality Council staff recommend an environmental impact statement concerning the development of these regulations as they have with other regulations passed by various agencies?

On page 152 concerning enforcement through a permit system, second paragraph. Would an environmental impact statement be required of the local government before a permit could be granted, and would there by any overlapping authority with other agencies in the state and local government concerning this matter?

On page 154, third paragraph, which states that a "developer whose project appears to be a development of regional impact," etc. This appears to conflict with a permit application which will be required by the Department of Health and Environmental Sciences, Environmental Sciences Division in the regulation of indirect sources as required by the Environmental Protection Agency. How is this conflict to be resolved? This also applies to major shopping centers, large subdivisions, industrial complexes, airports, etc. THe provisions for public hearings on most of the DGLI are already specified as a portion of the Clean Air Act of Montana. It appears to be unnecessary in this document, or if not unnecessary, a duplication of some of the activities that are currently being considered concerning DGLI.

On page 157 in the third paragraph dealing with the supposed lack of coordination between levels of government enforcing private development, etc. I do not believe that as stated here, the developer must repeatedly make "costly" presentations of his project over and over. I suspect that this statement is a very broad generalization without support. I further suspect that the contention that "the county commissions who should be making the final decision regarding a subdivision" and who supposedly "do not have the results of the Health Department's investigation" do in fact have this information or can get it if they want it. I suggest this element of the document be investigated in more detail to determine its accuracy. There also may be considerable value in having to sift through more than one agency.

[Mr. Wake, continued]

I question the accuracy of the statement made beginning with the last paragraph on 160 and ending on the first paragraph of page 161. Those best qualified for performing the needed work are not necessarily located within only those divisions or departments indicated.

On page 161 the second paragraph beginning "to avoid wasteful duplication of staff" it would appear to me that the recommendations made would insure a wasteful duplication of staff rather than utilization of staff and facilities and organizations that are already available. If any such unit is to be organized anyway, I suggest it should be in the Department of Lands.

Office Memorandum MONTANA STATE DEPARTMENT OF HEALTH

To: Steve Brown Date: October 7, 1974

From: Ben Wake

Subject: Land Use Policy Study by Environmental Quality Council Staff

The Federal Clean Air Act regarding non-degradation or significant degradation requires that the states determine for themselves those areas which will be of various classes in which only certain types of development can take place. It would appear to me that the first consideration in any land use policy is for the land itself; a determination by "the people" of what the land will be used for over the next 10 to 25 years. A projection beyond 25 years is almost impossible to make. In any case, the plans should be flexible and be reviewed on a routine and frequent basis such that the designation can be changed, if advisable. As an example, I would think that the area around Silver Bow, near Butte--the exact number of square miles is not known at this time--could be designated as an area suitable for high emission potential industrial development whereas in the Flathead or Missoula Valleys, another designation would be made. It is quite apparent, however, that the Department of Health and Environmental Sciences must in the very near future designate areas in the state, if the legislature does not do it, potential areas for no significant degradation or the other 2 possibilities, keeping in mind each time that in all areas, whether 1, 2 or 3, the most advanced state-of-the-are will be required, and ambient air quality standards will not be allowed to be exceeded regardless of the designation.

One should be aware that there are areas such as Missoula and possibly Billings Helena and Butte where the ambient air quality standards are already exceeded for particulate matter. Under these circumstances, a stringent enforcement of the Federal Clean Air Act would allow, in these areas, no further development which would produce particulate emissions. We have considered advising communities, where we know the ambient air quality standards are exceeded, that no further development of any kind which will produce an emission of the type being exceeded will be permitted; therefore, no growth or development, no matter how large or small, would be permitted and land use is effectively initiated but not necessarily for its best use(s).

Regarding indirect sources, such as shopping centers, highways, airports and other similar facilities, all should be aware that the Division's activities will soon accelerate in these areas to prevent the construction of certain types of facilities in areas where the ambient air quality standards already are exceeded or will likely be exceeded by the anticipated construction. As an example, the highway which detours up Montana Avenue and down 11th Avenue in Helena must curtailed in its use. Any program or plan by the Highway Department to increase, widen or expand the use of these streets must be stopped. The Division proposes to use every effort to prevent any further traffic on these streets and to reduce the amount of traffic on these streets by a substantial margin since the ambient air quality standards for particulate are already being exceeded and undoubtedly the standards for oxides of nitrogen and carbon monoxide.

The following is a proposal for management of land in Montana:

I. A proposal of regulations having the following basic elements to prevent significant deterioration of land values:

A. Area Classification Concept

Class 1 designations would restrict deterioration of previously determined land to be farm land, forest land, mining land, recreation land, etc. to a minimum by precluding the introduction of any additional major installations or acitivities. A major acitivity might be defined as one which required more than one acre in any ten acres.

Class 2 designation would restrict land designated for farming, forests, mining, etc. to that associated with normal well-controlled growth. A situation describing normal well-controlled growth might be one requiring 10 acres of the designated land in one square mile or some other designation.

Class 3 designation would be reserved for areas where the land use was not restricted unless more than one square mile of a township or some other designation would be changed.

B. Initial Classification of Areas

All areas would be designated as class 2 as of the date of promulgation, subject to redesignation by the counties or by federal land managers or any Indian bodies at any time.

C. Land Commissioners Approval Authority

Proposed redesignations by cities or counties or by federal agencies could normally be disapproved by the commissioner only if (1) the required procedures, specifically public participation, were not followed; (2) relevant environmental, social or economic considerations were arbitrarily disregarded; or (3) a county or a city was not willing the implement the land use review procedures.

D. Resolution of Disputes

The land commissioner will provide technical assistance in resolving such disputes but will not serve as arbiter. Arbitration is to be accomplished in the courts.

E. Land Subject to Review

An original list of perhaps 12 land use categories could be designated and diminished or expanded as further review and evaluation is made or as further local comment is received. Designations in these dozen or so categories must include an estimate of the social, economic and environmental impacts and would cover, initially, only the actual land use suggested and not indirect land use regulators such as air pollution control, etc.

F. The Baseline

The original land use specified should be that existing in 1972 as the baseline against which further use would be measured. The new regulations would specify the baseline to be the date of promulgation adjusted to account for land uses approved prior to promulgation.

G. Boundary Considerations

A land area proposed as class 2, as an example, would not be permitted to violate the increment in an adjoining class 1 area. Counties or cities would be cautioned to redesignate areas such that an adequate buffer zone is provided between any class 3 area and areas to be protected under more stringent criteria.

H. Land Use Modeling Procedures

Under any regulations, the land area reviewed should be based as much as practicable or possible on modeling in lieu of any better procedure. The procedures for modeling for land use would be largely economic, perhaps, but would be invaluable in making or testing a wide variety of decisions concerning certain areas of land and the integrating of other factors such as air quality, water quality, etc.

I. Delegation of Authority for Area Review

The land commissioner would delegate authority to the counties or to the cities to review all new land areas except for Indian sources and certain federal sources. The land commissioner would monitor the counties and cities exercise of this authority in a manner prescribed by law.

TO: Members of Interagency Land Use Advisory Council
John Ruess, Director, Enviromental Quality Council
Chuck Brandes, Enviromental Quality Council

FROM: Eldon Fastrup, Bob Duncan
[Mr. Fastrup is Agriculture Marketing and Statistical Unit Coordinator for the Department of Agriculture; Mr. Duncan is Administrator of the Staff Services Division, Department of State Lands]
This memorandum represents a joint position of the representatives of the Department of State Lands and the Department of Agriculture on the Interagency Land Use Advisory Council. While we cannot speak for the general public, our view could represent an agricultural aspect because of the responsibilities of our departments.

We feel that because of current economic uncertainties and because of a general feeling that the citizens of this state and citizens in general are becoming increasingly wary of the increases in government control over activities related to economic change the state should move with caution in the area of increased land use controls and should at this time emphasize implementing increased controls over the permanent loss of high quality agricultural land. We consider the permanent loss of productive farm land to be the most urgent long range land use problem. Other land use problems which would be controlled and evaluated under both the Critical Areas Concept and the Developments of Greater then Local Impact concept may or may not be just as critical as permanent loss of highly productive farm land, but we do not feel that the executive branch of state government should rush into pushing for general legislative authorization for these concepts without careful study of the effects of such concepts on Captial cost of developments: A lengthy review process involving either concepts with a possible hierarchy of local and state approval requirements for the same activity will increase the cost of the goods and services which are proposed.

[Messrs. Fastrup and Duncan, continued]

Unnecessary duplication of controls: Any legislation proposed should include a package of amendments to all existing laws (controlling various aspects of land use) which overlap the authority given to local governments so that land controls do not submit a proposed economic activity or aspect of the activity to multiple reviews and approvals. These must be clarity as to what the state must approve and what the local government must approve. We do not feel that time allows the Department of Intergovernmental Relations to -omplete such analusis prior to the 1974 legislature.

The cost of implementing the concepts: The cost to both local and state governments should be understood. The two concepts should be presented to the legislature and the public for study and legislation carefully developed over the next year if reaction is favorable. If any immediate legislation is necessary then it should be in the area of farmland protection by limiting at this time designation of critical areas in order to preserve highly productive agricultural land. Included in such legislation should be reasonable compensation for lost development opportunities upon proper application by a landowner within a specified time period after designation.

We consider, however, the first legislative priority to be the establishment of a centralized resource information, analysis and map division within state government followed by new land use control legislation.

STATE OF MONTANA

DEPARTMENT OF
FISH AND GAME

Helena, Montana 59601
October 8, 1974

RECEIVED
OCT 9 1974
ENVIRONMENTAL QUALITY
COUNCIL

Mr. John Reuss, Executive Director
Environmental Quality Council
Helena, Montana 59601

Dear John:

As suggested, we have reviewed the staff draft report of the Montana Land Use Policy Study. In responding to this study we will divide our comments into two sections - first, that part of the report addressed specifically to the Montana Department of Fish and Game, and second, general comments and suggestions for changes in the balance of the text.

On page 39 under the heading, "The Department of Fish and Game," we suggest rewording the second sentence to read, "Setting hunting and fishing seasons and expending funds for the protection, preservation and propagation of fish, game, furbearing animals and nongame animals is within the authority of the department."

On page 40 the fact that our department makes payments in lieu of taxes is interpreted as legislative intent that hunting and fishing opportunities not be provided by the private landowner. There is absolutely no relationship between payments in lieu of taxes and intent that hunting and fishing opportunities not be provided by the private landowner. The intent of the "in lieu of taxes" legislation (26-133) was to ensure that the Department of Fish and Game continued to make a contribution to support the local tax base, something we had been doing voluntarily prior to passage of the legislation mentioned. While it is not the policy of the state to have private landowners provide hunting and fishing opportunities, we believe it is the policy through judicial decree that private landowners are expected to support reasonable levels of wildlife populations in Montana. This fact, we believe, is contained in the supreme court cases of State of Montana vs. Rathbone, March 5, 1940, No. 8011, Supreme Court of Montana and in another case, Sackman vs. the State Fish and Game Commission, March 18, 1968, No. 11355, Supreme Court of Montana. Copies of these judicial decisions are attached for your information.

Further in that same paragraph, compensating landowners for hunting and fishing rights around federal preserves and refuges is discussed. This sentence would more appropriately be located in the paragraph above it where 26-1120 is directly discussed.

The final sentence in the second paragraph on page 40 then discusses rights granted the Fish and Game Department to control waters for the propagation of fish as described in Chapter 26-118 RCM. It should be clarified here that the section under discussion deals with lands "owned by the state" and not private lands.

Further on that page in the next to last paragraph, it should be mentioned that the Montana Department of Fish and Game is the state's official recreation agency.

On page 41, the statement is made, "The department also can repay private owners for damage from wildlife." We suggest that you review the two critical supreme court cases previously mentioned where the relationship between wildlife use and private land is placed in its proper legal perspective.

On page 42 the statement is made, "Unfortunately at no point is this policy related to others the legislature has promulgated for other state agencies." This statement is not correct, as indicated by our participation on various councils, committees and advisory boards. For example, the Fish and Game Department serves on the Water Pollution Control Advisory Board, the Pesticide Registration Board, the Montana Energy Advisory Council, the Interagency Land Use Advisory Council, the Predator-Rodent Control Advisory Board and numerous other committees to which we are assigned from time to time, either by the legislature or the governor's office.

It is also relevant that the Department of Fish and Game is specifically mentioned as a participant in the utility siting procedures. Inclusion of this department in these capacities surely relates our function to that of other state agencies.

Enclosed for your review and use is a copy of a letter written to Gail Kuntz of Energy Planning on April 26, 1974 briefly reviewing the integration of our legal responsibilities with other agencies - specifically as it relates to Section 16 of the Utility Siting Act.

The above comments conclude our reaction to the section entitled "The Department of Fish and Game." As stated, we also have some general comments on items found elsewhere in the text.

On page 25 the references are incomplete, in that the Environmental Information Center was cited in the text but not included in the references. On page 26 in the last sentence of the third paragraph we would like to see the words, "and plains" inserted after forests.

On page 29 the second paragraph begins a discussion of a cost/benefit approach, a process that our department frequently conflicts with, primarily due to the time frame over which values or costs are calculated and the treatment of intangibles. It is our opinion that these must be clearly discussed in the cost/benefit approach if it is to be applied to long-term land use planning or control. We believe some clarification is in order that elaborates on the inclusion of various externalities and intangibles.

Of a minor nature, on page 29 we would like to suggest the term "pay-out" be substituted for "payoff" as the latter has bad connotations.

On page 141 the discussion of a land use policy and options begins. Although we realize not every variable could receive mention, we would like to see "critical wildlife habitat" included as one of the variables in the first sentence of the third paragraph.

In the last sentence on page 142 a number of the standard "we need more jobs" and "family members born in Montana desire to stay in Montana" statements are made. These standard statements seem to be made so often that they are beginning to be accepted as true without substantiating evidence. We would be interested in at least a reference at this point in the text to lead us to data that support this conjecture. Also in that paragraph, a sentence starts out with "Too many Montanans had to leave the state to seek opportunity and a livelihood." Here again some quantification is needed of what "too many" is in relation to those who leave by choice being replaced by those who come here to live - again as a matter of free choice.

Page 143 continues this standard argument, apparently accepting (perhaps without analysis and documentation) the "Chamber of Commerce" approach. We are extremely interested in finding out the source of the data leading to these conclusions so that we may ourselves review that data for, if nothing else, our own edification.

Continuing on page 143 the argument on job diversity is made. At this point it seems some acknowledgment must be made of the price a wider choice of occupations extracts. For example, we cannot help but recall a Colstrip rancher's analogy that because his son entered college and pursued the occupation of a sociologist he did not feel compelled to do what he could to create social problems so the son could return to Rosebud County for employment. There are many types of jobs we are better off without, and a discussion of that perspective would not be inappropriate to balance the discussion we now find on pages 142 and 143. Since we do not demand that Cook County, Illinois create numerous jobs for foresters, farmers, wildlife biologists, rangeland managers, guides and outfitters, conversely we should not strive for a social condition that requires psychologists, sociologists, criminologists and a host of other occupations which perhaps specifically relate to industrialization and urban congestion.

Page 144 begins with an acceptance of growth and an effort to direct the argument toward how growth will be accommodated. It is our feeling that it is still not too late to begin the discussion about what quantity of growth can be accommodated, acknowledging that we shall grow some, but not accepting the position that the only control we have is how to accommodate it.

Recent studies by the National Economic Research Associates, Inc. and the Ford Foundation point out the desirability of scaling down to zero energy growth and certainly the inevitability that sooner or later this must be accomplished. These studies certainly have strong relevance in Montana, since our state is identified as an area expected to contribute to energy production.

In the second paragraph on page 144 the second sentence could well include "and Colstrip and Big Sky to Montana." The entire section "B. Accommodating Change While Preserving Values" emphasizes local control. While this is certainly the area of least controversy in discussing land use policies, local government has had control, has been reluctant to exercise it and has in fact accommodated the problem evident in many Montana counties. It seems that only after the damage becomes so grotesque and perhaps irreversible, such as in Ravalli County, do the locals conclude that some type of control is or was appropriate.

The report addresses itself to this problem on page 145 with its first assumption leading the debate to center around the words, "yet capable of performing the desired function" - perhaps somewhere in that assumption the word "willing" should be inserted.

On page 148 the role of the state as an entity to accept responsibility when local government does not is discussed. This discussion needs to be expanded, identifying who will decide when the locals have surrendered their options and what criteria will be used to determine this.

The text concludes on that page with the sentence, "The comprehensive nature of this effort makes state government the logical leader for such a program." This statement comes after the entire section leaves the impression that city and county government are asked to be the leaders. It is possible that in our review of this document we missed the point being discussed above. At any rate, we feel that this entire section needs rewriting so there is no opportunity to misunderstand precisely what government entity controls what type of land use decisions.

Page 149 begins the "C. Areas of State Concern" discussion. In item No. 1 we would like to see the listing of public facilities expanded to include, "and important recreation areas." Item No. 4 could also be expanded to include "recreation areas, game ranges, historic sites, etc."

On page 164 a statement crops up that we tried to deal with before - namely, what kind of growth should occur and where. Once again we do not feel it is too late to address the question, "Should we have growth at all?" and the degree of that growth before we begin talking about where it should occur. Accepting that growth surely must come, but with some limitation, surely is not an unrealistic position to assume. That there is limitation has not been adequately acknowledged.

These conclude our comments at this time. For the record, the review was conducted by Jim Posewitz, Steve Bayless and myself. We thank you for the opportunity for this review.

Sincerely,

Fletcher E. Newby
Deputy Director

FEN/JAP/sd
Encs

cc: Steve Brown

STATE OF MONTANA

DEPARTMENT OF STATE LANDS

STATE CAPITOL HELENA 59601 (406) 449-2074

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A RESOURCE FOR THE PRESENT AN OPPORTUNITY FOR THE FUTURE

September 24, 1974

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SEP 1974

ENVIRONMENTAL QUALITY COUNCIL

Mr. Charles E. Brandes
Research Coordinator
Environmental Quality Council

Dear Chuck:

Following is a summary of the income from the leasing (land use and mineral extraction) of state lands during the 1973-74 fiscal year.

Grazing Leases:	$ 2,163,806.97
Agricultural Leases:	5,548,575.32
St. Forester Misc. Use Fees:	54,277.41
Rentals on Oil and Gas:	2,739,051.66
Penalties on Oil and Gas Leases:	449,431.46
Metalliferous and Non-Metalliferous Lease Rental:	56,348.82
Timber Sales:	446,850.18
Oil and Gas Royalties:	1,284,735.67
Sand and Gravel Royalties:	173,254.86
Coal Lease Rentals and Royalties:	634,180.57
Total	$13,550,512.92

This amount does not include such items as right of way sales, land sales, interest on investments, and miscellaneous fees which should not be considered actual income from the state trust land resources. As you can see coal production is a small percentage of the income not "a large percentage" as stated in the draft report.

As I discussed with you earlier one of the causes of the low average per acre income from the state land trust is the relatively low (compared to private, not other public lands) grazing rentals. Grazing rentals are established by a formula set by the legislature (Sec. 81-433). For 1975 grazing rentals, the formula will produce a grazing rental of $1.69 (0-14 head section), $1.79 (15-19 head section), $1.89 (20 plus head section) per AUM (animal unit month). Most state land would fall into the $1.79 per AUM class. Although private leases are highly variable and I do not have any precise data, $6 per AUM could be used as an overall average for private lands. The State, however, does not supply fencing and water as would be the case in many private leases. This service has value.

I noticed a misquote in the section on the Fish and Game Department. On page 41, first paragraph, line 9, there is the legal quote "a worthy object of the trust as specified in the enabling statute of the Department of State Lands". The actual section (81-2504) reads: "a worthy

DEPARTMENT OF STATE LANDS

STATE CAPITOL HELENA 59601 (406) 449-2074

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October 10, 1974

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OCT 11 1974

ENVIRONMENTAL QUALITY
COUNCIL

John Reuss, Director
Environmental Quality Council
Capitol Station
Helena, Montana

Dear Mr. Reuss:

Following are some comments on the policy proposals contained in the draft "Montana Land Use Policy Study". I have previously sent Chuck Brandes comments on the Department of State Lands section.

Areas of Critical State Concern Enclosed is a copy of a letter to IGR which outlines some needed coordination between the responsibilities of this Department and the development of this concept. In addition to these specific comments, I have a sincere apprehension over the possibility of premature comprehensive legislative implementation of the concept because of current economic uncertainties. While I am certain that the concept must eventually be implemented, as in other states, I have a feeling that citizens in this state and citizens in general are becoming increasingly wary of increases in government control over activities related to economic change. As the result of your questionnaire survey there is an indication that a significant concern exists over the permanent loss of productive timber and agricultural land. It is my feeling that any immediate legislative implementation of the critical areas concept should be restricted to designation and regulation development for the specific purpose of preventing the loss of significant timber and agricultural resources. Included in such legislation should be reasonable compensation for lost development opportunities upon proper application by a landowner within a specified period of time after designation.

A critical areas planning concept either with or without criteria for specific resources to be protected should not be implemented without careful study of the effect on:

1. Capital costs of development: A lengthy review process with the possibility of duplicate permit requirements by state and local governments for the same activity will increase the cost of goods or services proposed.

2. Increased government costs: The cost of implementing the concept in terms of increase in government employment and expenditures should be fully understood.

Please let me emphasize that there is a need for critical area land use planning. One of the concepts lacking in the reclamation laws is that mining activities (if there is a choice between alternative locations) should occur in areas which have a relatively lower productive, cultural, environmental or scenic value. Reclamation laws should not necessarily contain such concepts because reclamation is an "on-site" concept. The provisions of the laws controlling surface mining of coal and uranium relate to the feasibility of a particular site for reclamation and the significance of the resources within or adjacent to a proposed mining area, not with the suitability of the site in terms of regional development goals and concerns. Reclamation laws for surface mining of other minerals relate only to proper reclamation procedures.

There is a need at some government level to:

1. Determine the magnitude and number of mining operations in an area. Burlington Northern is not the only company with development plans for McCone County.

2. Determine the most desirable location of mining activities if there are alternative locations available.

3. Designate areas which are of such local and regional importance that no mining activities should occur.

Development regulations, however, should be restricted to these areas of concern. Control over the specific mining and reclamation activities of a surface mine should remain with the state law mechanism which is presently operating in order to avoid unnecessary duplication.

Sincerely,

Bob Duncan

Robert S. Duncan

Enc.

CC: Steve Brown

October 4, 1974

John Andrews
Community Development Bureau
Department of Intergovernmental Relations
State of Montana
Helena, Montana 59601

Dear John:

You asked that I submit written comments on needed corrdination between the critical areas concept which your department is developing and the responsibilities of this department.

State Trust Lands

Article X, Section 4 of our present constitution reads as follows:

"The governor, superintendent of public instruction, auditor, secretary of state and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange and sell school lands and lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law."

While any parcel of state trust land which is within a designated area of critical state concern should be managed in such a way to conform to local development plans and regulations, the final authority over the use of the trust lands must remain with the board of land commissioners. The legislature can impose regulations and restrictions for the exercise of this authority but it probably could not delegate this authority to a local government. A significant restriction imposed by the 1974 legislature reads as follows:

Sec. 81-302(2) "....When state lands are classified or reclassified (e.g., when a change in land use occurs)....special attention shall be paid to the capability of the land to support an actual or proposed land use authorized by each classification. A capability inventory shall be made prior to changing the classification of state lands. Such inventory shall include, when appropriate to the classification, information on soils capability, vegetation, wildlife use, mineral characteristics, public use, aesthetic values, cultural

values, surrounding land use and any other resource, zoning or planning information which is related to the classification."

In order to eliminate possible constitutional conflicts with the authority of the Land Board, I would recommend the following provision be included in any critical areas legislation.

"Lands under the control of the board of land commissioners shall be exempt from development regulations, provided however, that the board of land commissioners shall take such reasonable steps to comply with such regulations as are consistent with its duties and responsibilities as defined in Article X of the Constitution and Title 81 (R.C.M 1947)."

Land Reclamation

It is my feeling that critical areas legislation would have a much better chance of passage if the potential problem of "bureaucratic shuffle" because of the creation of ahierarchy of reviews, applications, and permits by various local and state agencies to regulate the same land use activity is addressed in the legislation. If a state agency is charged with the responsibility, and citizens are required to apply to such state agency to determine if a proposed activity or aspect of an activity complies with a state law dealing with environmental or land use damage, the proposed activity should not be subjected to local control except for those aspects of the activity which are not controlled by a state law and its regulations.

In the case of reclamation laws the aspects of mining operations which are not controlled at the state level are:

1. The location of mining operations based upon regional economic, social and environmental considerations.

2. The special, exceptional, critical or unique characteristics of land proposed for surface mining any mineral except coal and uranium. Permits for surface coal and uranium mines may be denied on the basis of special or unique characteristics as defined in Sec. 50-1042(2). These criteria are site specific and do not include highly productive agricultural land.

3. The intensity of mining activity in any one area.

4. The operation of any mineral processing facility not at the mine site.

Conversely, a state agency should not issue a permit or be required to waste state funds in reviewing an application for a permit if the proposed activity is not consistent with critical area plans and regulations. Under present reclamation laws this department is required to accept, review,

approve or disapprove an application for a mining activity on the basis of criteria specified in the reclamation laws.

There would be different but similar situations under the utility siting authority, waste discharge permits, air quality, etc. I do not think these are problems which should be resolved through administrative law, they should be resolved in any critical areas legislation.

For what it is worth, following are some rough provisions which might be considered:

> "Any aspect of a development or land use activity for which a state agency is required to review and approve or disapprove shall not be subject to control by development plans and regulations as specified in this act."
>
> "Any state agency which is required to review and approve or disapprove various aspects of a development or land use within a designated critical area is authorized to reject any application for such review until such time as the appropriate authority in charge of enforcing development plans and regulations, as specified in this act, has indicated that the aspects of the development or land use under control of such authority are approved or requests review by the state agency."

I hope these comments will be helpful.

Sincerely,

Robert S. Duncan

RSD/k

CC: Hal Price, Chief, Community Development Bureau,
Department of Intergovernmental Relations

STATE OF MONTANA

MAIL TO CAPITOL STATION, HELENA, MT 59601

DIRECTOR'S OFFICE	406/449-3494	HUMAN RESOURCES DIVISION	406/449-3420
AERONAUTICS DIVISION	406/449-2506	INDIAN AFFAIRS	406/449-2746
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HOUSING DIVISION	406/449-2804		

THOMAS L. JUDGE
GOVERNOR

Montana's Agency for Planning & Local Affairs

November 7, 1974

MEMORANDUM

TO: John Reuss, Director
Environmental Quality Council

FROM: Hal Price, Administrator
IGR/Division of Planning

RE: Montana Land Use Policy Study - Staff Draft Report

The following comments pertain to the recommendations section of the Environmental Quality Council's staff draft report, "Montana Land Use Policy Study," dated September 16, 1974.

In addition to a number of state level planning responsibilities, the Planning Division, and its predecessor agencies, has, since 1967, carried on an intensive program of developing and facilitating general land use planning and regulation at the local government level. The Division's program has been carried on with full knowledge of the difficulties in the traditional system of limited jurisdiction, local government planning -- particularly the difficulty of attaining the planning goals of a statewide constituency. However, at the same time the Division's program has been carried on with the understanding that successful implementation of state land use policies and plans would be virtually dependent on local governments, the strength of their planning organizations and the support of local citizens.

The E.Q.C. Land Use Study appears to be cognizant of the necessity of a state-local partnership in planning and managing land use activities that are of statewide concern or of greater than local concern. The recommendation for legislation dealing with "areas of state concern" and "development of greater than local impact" reflect many ideas which evolved through cooperative efforts of the Planning Division and the E.Q.C. staff. Accordingly, we are in substantial concurrance with this recommendation -- in fact, it

appears that the only salient point of disagreement is whether and at which point in the designation process interim land use regulations should be imposed on an area which has been nominated for designation. The Staff Report recommends that mandatory interim controls be instituted at the moment local government issues a notice of hearing in response to a request for designation.

The Planning Division believes that interim regulations prior to designation would be inappropriate and legally unjustifiable in most cases and that any such control prior to designation should be limited to situations in which an overriding public necessity can be demonstrated. One possible alternative would be to authorize the Land Use Commission to impose interim controls prior to designation where good cause is shown.

A second major recommendation of the Staff Report would transfer the Energy Planning Division of the Department of Natural Resources and Conservation to the Department of Intergovernmental Relations (referred to as the Department of Planning and Local Affairs).

In our opinion the exercise of the permit issuing authority contained in the Utility Siting Act should rest with a commission rather than with a single department head. Unlike the Department of Intergovernmental Relations the Department of Natural Resources is governed by such a commission. Furthermore the duplication of effort which is suggested by the existence of two state agencies whose functions relate to land use planning and control could be greatly reduced through a concerted effort by the Departments of Intergovernmental Relations and Natural Resources to share data bases and computer hardware and software. Similiarly, contractual arrangements between the two departments would allow each to utilize the other's staff expertise when the need arose. For the foregoing reasons, we are not in accord with this recommendation.

Finally, we are in full accord with the Draft Report's recommendation for the creation of a commission on growth and Montana's future. As the Report notes, such "Futures Councils" have been formed in a number of other states and their efforts have proven to be worthwhile in dealing with the problem of establishing long-range goals for their states.

HP/ke

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

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NATURAL RESOURCES BUILDING
HELENA, MONTANA 59601

October 15, 1974

Mr. John Reuss, Executive Director
Environmental Quality Council
1228 11th Avenue
Helena, MT 59601

Dear John:

As requested at the September 24 Interagency Land Use Advisory Council meeting we have reviewed the draft report of the Montana Land Use Policy Study. I wish to offer several comments on that portion of the report dealing specifically with the Department of Natural Resources and Conservation as well as some general suggestions for changes in the remainder of the text.

The statement on page 62 that "Erosion is no longer a major threat to the states farm and grazing lands. . ." should be substantiated with supporting data. In actuality, human-caused erosion remains a serious problem and I would suspect that the statement on page 62 cannot be documented. Accordingly, I would recommend that it be deleted or modified. Perhaps the point should also be made that sediment from unappropriate land use practices is the major water pollutant in Montana, both in terms of actual volume and ill-effects.

The first paragraph on page 66 should be clarified. On page 65 the conditions for granting a water use permit are indicated and then the statement is made that ". . .the last part of the Act's policy statement seems to have been forgotten in the procedures formulated for reviewing permit applications." The inference is unclear and I would recommend more specification of what is meant with reference to the actual application procedures.

There are a great many different state agencies with various and perhaps somewhat duplicative authorities over land use related programs as your survey points out. Carefully thought-out changes in organizational responsibility are necessary if the executive branch is to respond adequately to the land use planning challenges which lie ahead. That is why we are somewhat mystified by the singling-out of the Energy Planning Division as the way to "avoid a wasteful duplication of staff and staff effort with regard to information gathering and analysis. . ." Let me first explain that the EPD is a highly specialized agency dealing with a very tightly-controlled purpose: the assessment of proposed energy generation and transmission facilities. The division, working almost exclusively with secondary data, interprets these data for very specific uses.

It is not an all-purpose data-gathering agency. The Energy Planning Division is tied closely to the remainder of the Department of Natural Resources and Conservation so that it cannot be as easily severed as indicated on page 161. The inference is made that by simply switching EPD to IGR and changing its name we'll have a state planning agency. I ask if you really believe that to be the case.

I believe that other steps need to be taken before such an agency is created. Long-range goals relating to growth and land use are desperately needed to unravel conflicting mandates and to provide direction to our planning efforts. Accordingly, your recommendation on page 164 for the establishment of a Commission on Growth and Montana's Future is excellent. You may wish to address the question as to whether the commission should be a separate body or an arm of the Land Use Commission. In addition, the suggestions on page 164 that the members be "prominent" citizens may not be as democratic as it should be. Somehow we should try to more fully involve those who are not "prominent" but nonetheless have a stake in the future of Montana. You may want to refer to the "jury-duty" type of membership mentioned in the Governor's paper, "Energy and Growth."

A second basic step that needs to be taken is a statewide land and water resources inventory in a form that is specifically tailored to critical areas designation and local administration. For the most part, this will require that all state resource data-using agencies begin to pool information for land use planning. Some central repository for this information should be identified. We must then determine data needs, data coverage and then go about the important business of filling-in the data gaps.

I am very hopeful that the final land use policy report will contain a more rigorous discussion of growth. The growth question should be the very foundation of the report. The "accommodation" philosophy that has yet to provide any real solutions to our growth problems is too evident in the draft. We should begin now to address the basic question, "Is continued material growth compatible with the maintenance of the quality of life in Montana?" I would also point out on page 144 that we have our 'Miami Beaches" in Montana as well and a specific example might be appropriate here.

On page 146, what are "the legitimate expectations of its citizens?" I would suspect that this is highly variable and often in conflict and perhaps that point should be made.

I am somewhat puzzled by the strong emphasis on local control found in the entire section "B, accommodating change while preserving values" while elsewhere in the report the traditional abdication of responsibility at the local level of government is acknowledged. A dramatic example of this may be found in Ravalli County where the commissioners continue to resist a local interim zoning petition in spite of the widespread damages done by uncontrolled rural subdivision.

The report on pages 142-143 presents an argument for more jobs, employment diversity etc. which seems really out-of-place in this report. The standard statements of "we need more jobs and family members desire to stay in Montana" should be backed-up with supporting data. How may people, for example,actually leave by choice to seek higher incomes?

The argument on page 143 for job diversity is particularly distressing. Montana will surely pay a high price for a wider choice of jobs which should be pointed out. We don't ask Los Angeles to employ our foresters, ranchers and wildlife biologists. Nor should Los Angeles expect to export the specialists found in congested urban areas to Montana. Montana is what it is because of a heritage and life style tied intimately to the land. It is these kinds of values that may be sacrificed if more job diversity is sought.

In closing I would like to re-emphasize that a consideration of the kinds and quantity of growth is essential. It is perhaps natural that I concentrated on those points with which I disagree. Much of the report is well-researched and well written and I would like to commend you and your staff for this initial effort.

Thank you for the opportunity for this review.

Sincerely,

GARY J. WICKS, DIRECTOR
DEPARTMENT OF NATURAL
RESOURCES AND CONSERVATION

GJW/WC/nj

STATE OF MONTANA
DEPARTMENT OF HIGHWAYS

October 10, 1974

RECEIVED
OCT 15 1974
ENVIRONMENTAL QUALITY COUNCIL

Mr. John Reuss, Director
Environmental Quality Council
State Capitol
Helena, Montana 59601

Re: Montana Land Use Policy Study

Dear Mr. Reuss:

Contained herein are comments from the Department of Highways concerning the draft report of the Montana Land Use Policy Study. Reference will be made to page numbers in the report.

Page 51 - Paragraph 2 --should read:

Junkyards within 1000 feet of the right of way of interstate and primary roads require a license issued by the Department of Health and Environmental Sciences with the concurrence of the Department of Highways. The erection of outdoor advertising within 660 ft. of the right of way is regulated by the Department of Highways.
Paragraph 3:

The comments concerning the advertising unit of the Department of Highways are inappropriate and unnecessary. There appears to be no correlation between this unit and land use policies.

Page 52 - Paragraph 1 --(concerning control of access)

Since the passage of state legislation allowing control of access on all Federal Aid highways, this Department reviews all projects to determine whether some form of limited access should be considered. Many Primary projects are now being designed to restrict access which will result in a safer road and more important to control land use adjacent to the highway. These controls are being placed in cooperation with City-County Planning Boards, County Commissioners and other groups concerned with land use.

Page 53 - last paragraph

The Action Plan recently developed by the Department of Highways sets down in a definite plan the operational proceedures which have been Departmental policy for many years. Our proceedures have been addressing

continued on Page 2

land use and probable effect of highway locations on land use for many years. We have a land use planner on our staff who makes a definite contribution toward planning of highway projects. Input from our planner along with coordination with City-County Planning Boards are all considered in project location and development and are resulting in limited access proposals that will protect the expected land use and allow for its appropriate development.

Further, other areas of technical involvement such as air quality, noise, etc. are thoroughly considered in highway planning so that negative effects the highway improvement may have on the land, can be ascertained, evaluated and addressed.

The statement that historically, the Department has expressed disbelief that its action could have any influence on land use, was probably a true statement until about 10 years ago. However, we would not consider it to be at all true in recent years. Urban Transportation studies have been completed in all major Montana cities which incorporate Total Community Planning. Those elements of the transportation studies supplied by City-County Planning Boards such as population and land use, interface with the comprehensive plan. Other planning efforts being carried out by Urban Renewal and Model Cities Departments are given full consideration during each step of a transportation study and in the development of the final transportation plan.

Page 54 - paragraph 2

The routing of a Secondary Highway is not solely the decision of the Board of County Commissioners. This body does originate the request for Secondary road routes, but it must be approved by the Montana Department of Highways and the Federal Highway Administrator all the way to Washington, D.C. before a road can be placed on the Secondary Road System.

Page 154-158 - Developments of Greater than local impact.

The guidelines as proposed under this section would more or less govern the development of Highways. Our review did not bring out any significant recommendations to comment on at this time.

I will be looking forward to the opportunity to review the rough draft of legislation being developed for presentation at the October 15 meeting.

Sincerely yours,

J.R. Beckert
Administrator
Engineering Division

JRB:jf